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In the Supreme Court of the United States

October Term, 1980

No. _____

BIG BEAR SUPERMARKETS NO. 3,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE KING
GRETCHEN BRAMBACH
1504 Franklin Street
Oakland, California 94612
Telephone: (415) 834-4350
Attorneys for Petitioner, Big Bear Supermarkets No. 3

INTER-CITY PRINTING COMPANY, OAKLAND, CALIFORNIA 94607

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QUESTIONS PRESENTED

1. Whether the inconsistent decisions of the Ninth Circuit Court of Appeals in *NLRB* v. *Big Bear Supermarket No. 3* and in *NLRB* v. *Transcontinental Theaters, Inc.*, obfuscate the law governing franchise agreements and thereby impair the right to contract.

2. Whether the remedy ordered by the National Labor Relations Board and upheld, without consideration, by the Ninth Circuit Court of Appeals constitutes a punitive and unlawful penalty.[1]

[1] The following were also parties to the proceedings below: Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO; Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workerman of North America, AFL-CIO; and Richard Holmes.

In the Supreme Court of the United States

October Term, 1980

No. ———

BIG BEAR SUPERMARKETS NO. 3,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Big Bear Supermarkets No. 3, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 12, 1980.

OPINIONS BELOW

The Decision and Order of the Administrative Law Judge is unreported and is printed in Appendix A hereto, *infra*, pages 68 and 141. The Decision and Order of the National Labor Relations Board, reported

at 239 NLRB No. 26, 100 LRRM 1067 (1978), is reprinted in Appendix A hereto, *infra*, page 43. The Opinion of the Ninth Circuit reported at 80 DAR 1049 (April 23, 1980) and the Amendment thereto, and the judgment of the Ninth Circuit is reprinted in Appendix A hereto, *infra*, pages 18, 36 and 38.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit (Appendix A, *infra*, page 38) was entered on May 12, 1980. A timely petition for a rehearing was denied on May 22, 1980 (Appendix A, *infra*, page 17). The jurdisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves section 8 of the National Labor Relations Act, 29 USC § 158, which states, in pertinent part:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USC § 157];
>
> (3) by discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor or-

ganization: Provided, that nothing in this Act [29 USC §§ 151-158, 159-168], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein or on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [29 USC § 159(a)], in the appropriate collective-bargaining unit covered by such agreement when made and (ii) unless following an election held as provided in section 9(e) [29 USC § 159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, that no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee

on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section (a) [29 USC § 159(a)].

STATEMENT OF THE CASE

This is an unfair labor practices action, originating when two unions[2] filed charges against petitioner Big Bear alleging violations of § 8(a)(1), (3) and (5) of the National Labor Relations Act.

Petitioner Big Bear owns and operates a number of supermarkets in San Diego County and has a 20-year bargaining history with the Unions in question. In November of 1976, Big Bear franchised one of its markets, located in La Mesa, California, to Richard Holmes. Big Bear transferred all of its employees at the La Mesa store to other Big Bear markets upon execution of the franchise agreement. (Decision and Order, pp. 2-3)

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[2] Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO and Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workermen of North America, AFL-CIO.

Based on this franchise agreement, the unions filed charges and the general counsel issued a complaint alleging that the franchisee, Richard Holmes, was a "subordinant entity" and a "disguised continuance" of petitioner Big Bear, so that the two were alter egos for the purposes of the Act. (Decision and Order 4:5-24.) Thus, petitioner Big Bear was charged with Holmes' alleged violation for refusal to bargain and refusal to honor the collective-bargaining agreements under § 8(a)(1) and (3) of the Act, as well as its own alleged violations for the pre-franchise employee transfers under § 8(a)(1) and (5) of the Act. (Decision and Order 4:24-5:11.) Jurisdiction below was based on the stipulated site of the alleged unfair labor practice.

The facts in the case are not in dispute: the La Mesa store became unprofitable and Big Bear franchised it to Richard Holmes, simultaneously transferring the La Mesa employees to its other stores; Holmes hired new employees and, without hiatus, operated the La Mesa store; and the franchise agreement included provisions for a salary draw, managerial assistance, accounting procedures, right to termination of the agreement and a minimum required down payment.

The Decisions Below

The Administrative Law Judge, in a careful opinion, applied the accepted test for alter ego by examin-

ing the evidence for common management, business purpose, operation, equipment, customers, supervision and ownership. (Decision and Order 5:13-18 and n. 6; Decision of the Administrative Law Judge [hereinafter DALJ] 33:42, et seq., especially 33:49-34:4.) The ALJ found that, although the La Mesa store retained the same business purpose, equipment and customers after franchise to Holmes (DALJ 36:1-25), there was no substantial identity of supervision, especially as to labor practices (DALJ 34:18-35:51), nor identity of ownership (DALJ 36:27-37:27), management or operation (DALJ 37:39-40:14). The ALJ therefore concluded that Holmes was not the alter ego of Big Bear (DALJ 38:18-26) and dismissed the complaint (DALJ 39:15-16).

Upon precisely the same facts, the Board concluded that Holmes was an alter ego of Big Bear. (Decision and Order 15:15-16:1; 17:5-6.) The Board also concluded that Big Bear and Holmes constituted a single employer, although the issue was not raised by the complaint or in any of the proceedings below. (Decision and Order 16:2-3; 17:2-3.)

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the Board and granted enforcement of its order. The Court applied the "single employer" test set forth in *N.L.R.B.* v. *Don Burgess Const. Corp.*, 596 F.2d 378 (9th Cir.), cert. denied, 100 S.Ct. 293 (1979). (Opinion 7:31-12:3.)

Initially, the Opinion contained no reference to *N.L.R.B.* v. *Transcontinental Theaters, Inc.*, 568 F.2d 125 (9th Cir. 1978) (reprinted in Appendix A, *infra*, page 143), in which the court had upheld a franchise agreement under strikingly similar facts. In a footnote, issued as an amendment to the opinion, the court simply noted that the facts in *Transcontinental* were not the same as the facts in the Big Bear case.

At no point in its deliberations did the Board or the Court of Appeals discuss or examine the "remedy" drafted by the Board.

REASON FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Resolve Conflicts in the Law Governing Franchise Agreements.

In the *Transcontinental* and *Big Bear* cases, the Court of Appeals reached opposite conclusions based on virtually identical franchise agreements. In *Transcontinental*, the corporate owner of movie theaters contracted out the operation of a money-losing theater to a general partnership, Cynatron Enterprises, composed of two men. Transcontinental terminated the existing union employees and, without hiatus, Cynatron took over the operation and hired its own employees.

The Transcontinental-Cynatron agreement provided for termination by Transcontinental if Cyna-

tron did not properly operate the theater. The financial arrangement provided that Cynatron pay an established rent plus a percent of its receipts and net profits. The agreement also provided for a salary draw for the partners. Transcontinental was to assist Cynatron in its operation and to provide the financial accounting forms used. Cynatron was not required to invest any capital or to furnish any security deposit. (*N.L.R.B.* v. *Transcontinental Theaters*, *supra*, 97 LRRM at 2596.)

Based on these facts, the Board found that Transcontinental had not relinquished its economic control and interest in the theater. The Court of Appeals overturned the Board's order based on the fact that Transcontinental did not fully exercise all of its rights of control over the daily management of the theater.

In *Transcontinental*, the fact that the ultimate risk of loss fell on Transcontinental was immaterial. In contrast, the *Big Bear* court found that the failure of the franchise agreement to "shift" the "ultimate risk of loss" to the franchisee (Opinion 5:20-27) was a telling factor in its finding of a single employer (Opinion 10:9-23).

Moreover, these decisions, read together, rule that the provisions of a franchise agreement are relevant only insofar as they are actually exercised. Under this rule, the Court of Appeals must step outside its purview and examine specific facts each time it reviews a franchise agreement.

The *Transcontinental* court found that control over the labor relations is a "crucial issue." (*N.L.R.B.* v. *Transcontinental, supra,* 97 LRRM at 2597.) In contrast, the *Big Bear* court ruled that control over labor relations was irrelevant. (Opinion 11:11-31.)

The *Transcontinental* court noted a prior Ninth Circuit decision, *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 137 LRRM 1220, Aff'd. 322 F.2d 902 (9th Cir. 1964), which found the criterion of "common ownership or financial control" to be the least important of the four "single employer" criteria. In contrast, the *Big Bear* court found common ownership or financial control to be "*the critical criterion* in this case." [Emphasis supplied] (Opinion 9:21-24.) By its ruling in Big Bear, the Court of Appeals has transmuted the formerly least important criterion into the controlling criterion.

The above-noted conflicting rules create an untenable burden so as to impair the right to contract. Therefore, prospective franchisors and franchisees look to this Court to establish a uniform set of rules applicable to franchise agreements.

II.

The Remedy Ordered by the Board Is Unnecessarily Harsh and Operates as an Unfair Penalty.

The award against the employer in this case centers on "The Remedy," attached as Appendix A to the Board's Decision. The Board order (239 NLRB No. 26 at p. 22) and the judgment issued by the

Ninth Circuit Court (Judgment 4:4-8) state that the employees must be made whole "in the manner set forth in the section of the Decision and Order entitled 'the remedy'." This vital "remedy" section was not discussed by the Board or by the Court of Appeals; it is not reprinted in either decision.

The section of the Board Decision entitled "The Remedy," states, in pertinent part:

> [W]e shall also order Respondent to restore the *status quo ante* by applying the terms and conditions of the *current* collective-bargaining agreements with these unions to the La Mesa store employees, retroactive to November 15, 1976 . . . . [emphasis supplied] 239 NLRB No. 26 at p. 19.

The Board found that the franchise agreement entered into on November 15, 1976 was a sham. Therefore, the Board ordered that all remedies shall be retroactive to November 15, 1976. The backpay, however, will be awarded under the *currently existing* collective-bargaining agreement.

The former collective-bargaining agreement with the Retail Clerks Union expired on July 30, 1978.[3] On that date, a new agreement was negotiated. On July 30, 1978, the only decision in the Big Bear-Union dispute, that of the ALJ, ruled that the fran-

[3]The Collective-Bargaining Agreement with the Amalgamated Meat Cutters expired on November 4, 1979, at which time the appeal in the instant case was pending. The "penalty" analysis applicable to the Retail Clerks Union also applies to the Meat Cutters Union because the Board remedy mandates application of a current agreement to remedy a prior unfair labor practice.

chise of the La Mesa store was a bona fide transaction. The current collective-bargaining agreement was negotiated, therefore, with the understanding that the La Mesa store was no longer part of the appropriate unit.

The order of the Board, as applied, sets forth a remedy which constitutes an unfair penalty and does not, under the circumstances of this case, further the purposes of the Act. *N.L.R.P.* v. *Dent*, 534 F.2d 844, 91 LRRM 3007, 3009 (1976). In *Dent*, the Ninth Circuit discussed the inappropriateness of penalizing an employer, as the guilty party, by demanding enforcement of an agreement which the evidence showed the employer would never have made on his own. The Court found that, pursuant to 29 U.S.C. § 158(b), Congress has directed that the obligation to bargain does not compel either party to agree to a proposal or require the making of a concession. 91 LRRM at 3009. Moreover, the Board is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement. *H. K. Porter Co., Inc.* v. *N.L.R.B.*, 397 U.S. 99, 102 (1970).

The Board order in the instant case is in contravention of the *Dent* and *H. K. Porter* rationales, in that it is an attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. *Id.; Overnight Transportation Company* v. *N.L.R.B.*, 372 F.2d 765, 770, 64 LRRM 2359 (4th Cir. 1967).

Had Big Bear been bargaining with the La Mesa store as part of the "appropriate unit," it would never have reached the agreements it did with the two unions. The La Mesa store was losing money; excluding it from the bargaining unit upgraded the financial profile of Big Bear used by the parties as a basis in negotiating their new contracts. The Board order feeds the La Mesa employees into the equation twice, instead of once, and this faulty algebra results, not in a remedial, make whole award, but rather in an unnecessarily harsh double penalty against the employer.

The current union contracts are more favorable to the unions because they were negotiated on the basis that the La Mesa store, a mony loser, was not a part of the appropriate bargaining unit. The Board Remedy would apply this more favorable contract to all employees hired at the La Mesa store between November 15, 1976 and the present. These are the same employees who only became union members by order of the Board. Thus, in one step, the Board has transformed the La Mesa employees into union members; in the second step, it has rewarded these new union members with backpay under an arrangement that never would have been reached if they had been union members when the agreement was negotiated.

It is necessary to determine if the remedy ordered is remedial or punitive, and backpay awards can fall into either category. *N.L.R.B.* v. *J. H. Rutter-Rex*

Mfg. Co., 96 U.S. 258, 265 (1969). Four factors are considered in determining if a backpay award is remedial or punitive: (1) the bargaining history of the parties; (2) the economic conditions of the business; (3) the cost to the company; and (4) whether the employer's violation shows a "brazen" disregard of the Act. *Carpenter Sprinkler Corp.* v. *N.L.R.B.*, 605 F.2d 60, 67 (2d Cir. 1979).

No Court applied these factors to the award ordered in this case. Rather, "the remedy" section of the Board Order was ratified by the Court of Appeals without consideration. In fact, "the remedy" mandates backpay under a *current* collective-bargaining agreement and constitutes an unnecessary and punitive remedy against the employer.

Resolution by this Court is necessary in order to prevent such appendixed "remedies" from slipping through the cracks of legal argument, unchecked, to become punitive penalties against employers.

CONCLUSION

WHEREFORE, petitioner respectfully pray that a writ of certiorari be granted.

Dated: August 5, 1980.

By: GEORGE KING
Counsel for Petitioners
BOORNAZIAN, KING, JENSEN & GARTHE
A Professional Corporation

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed May 22, 1980, Richard H. Deane, Clerk

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. BIG BEAR SUPERMARKETS No. 3 and its alter ego RICHARD HOLMES, *Respondent.*	No. 79-7100 NLRB CASES 21-CA-15605 21-CA-15703 ORDER

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: GOODWIN, HUG, and SKOPIL, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed April 2, 1980, Richard H. Deane, Clerk

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, VS. BIG BEAR SUPERMARKETS No. 3 and its alter ego RICHARD HOLMES, *Respondent*. AMALGAMATED MEAT CUTTERS & BUTCHERS WORKERMEN OF NORTH AMERICA, AFL-CIO, *Intervenor*.	No. 79-7100 NLRB CASES 21-CA-15605 21-CA-15703 OPINION

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: GOODWIN, HUG, and SKOPIL, Circuit Judges. HUG, Circuit Judge:

The National Labor Relations Board petitions this court for enforcement of its order finding Big Bear Supermarkets No. 3 ("Big Bear") in violation of section 8(a)(1), (3), & (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3) & (5). The Board found that Big Bear violated section 8(a)(1) & (5) of the Act by repudiating collective bargaining agreements covering employees of Big Bear's market in La Mesa, California, and by refusing to recognize and bargain with the Retail Clerks

Union Local 1222 and the Amalgamated Meat Cutters Union Local 229. The Board also found that Big Bear violated section 8(a)(1) & (3) of the Act by transferring employees from the La Mesa market because of their union representation.

The principal issue of this appeal is whether Big Bear and Richard Holmes, franchisee of the La Mesa market, are a single employer within the meaning of section 2(2) of the Act. The Board's findings of unfair labor practices are based on its conclusion that Holmes is the alter ego of Big Bear, and therefore that Holmes and Big Bear are a single employer rather than parties to a bona fide franchise agreement. We affirm the decision of the Board and grant enforcement of its order.

I.

FACTS

Big Bear owns and operates a chain of markets in the San Diego area. For over 20 years, the Retail Clerks Union and the Meat Cutters Union have acted as the exclusive bargaining representatives for Big Bear employees who are members of multi-store bargaining units at Big Bear meat and grocery markets. At the time this controversy arose, Big Bear was party to a collective bargaining agreement with the Retail Clerks Union that ran from July 28, 1975 to July 30, 1978, and was party to a collective agreement with the Meat Cutters Union that ran from

November 8, 1976 to November 4, 1979. Each collective agreement covered Big Bear employees at the La Mesa market.

In each of the two fiscal years ending July 31, 1975 and July 31, 1976, the Big Bear market at La Mesa suffered net losses totalling more than $50,000. The financial difficulties were principally due to a series of state condemnations that dramatically reduced the parking space for the shopping center in which the La Mesa market is located.

Effective November 15, 1976, Big Bear franchised the La Mesa market to Richard Holmes, a former store manager at another Big Bear market. The parties stipulated in the record before us that the La Mesa market is the only operation that has been franchised by Big Bear.[1] Holmes is the son of a director, officer and shareholder of Big Bear.

Big Bear transferred the union employees at the La Mesa market to other Big Bear operations, and Holmes hired new employees. Neither union was notified of the transfer. Moreover, although the collective agreement with the Retail Clerks Union provides

[1] Appended to the brief filed by the Meat Cutters Union are letters written by a representative of Big Bear and addressed to the Unions. They indicate Big Bear's intention to reacquire the La Mesa market from Holmes and to sell that market and another Big Bear store to independent managers for operation under the Big Bear name. The Meat Cutters Union requests this court to take judicial notice of the letters as adjudicative facts pursuant to Fed. R. Evid. 201. We decline to take judicial notice of the contents of the letters, because the Meat Cutters Union has failed to establish that the information in the letters is not subject to reasonable dispute, as required by Fed. R. Evid. 201(b). We take no notice of the letters in our evaluation of the Board's petition to enforce its order.

that employees subject to transfer are entitled to a seven-day period to accept the transfer or to apply for employment with the new owner, none of the transferred employees was given that option. Big Bear and Holmes have refused to apply the terms of the collective agreements to the new La Mesa employees, to recognize or bargain with the Unions with respect to those employees, and to comply with the request of the Retail Clerks Union for the names and addresses of the new employees that work in job classifications falling within the bargaining unit represented by the Retail Clerks Union.

The Unions filed unfair labor practice charges against Big Bear. The General Counsel for the Board issued a complaint alleging that the La Mesa store is an alter ego of Big Bear within the meaning of section 2(2) of the Act, and that the franchise arrangement was a sham transaction motivated by Big Bear's desire to retain control over the La Mesa market while cutting losses by avoiding the terms of the collective agreements. Holmes was permitted to intervene in the case and to participate fully in the proceedings before the Administrative Law Judge ("ALJ").

John Mabee, president and principal stockbroker of Big Bear, testified before the ALJ that the decision to franchise the La Mesa market was prompted by legitimate business considerations. He testified that the market was sold to minimize further losses,

but that the Big Bear name was retained through the franchise arrangement to prevent encroachment on its market share in the area and to maintain a "draw" to the La Mesa shopping center, which Mabee himself owns and leases to several commercial tenants.

The franchise agreement recites that the parties intend Holmes to act as an independent contractor rather than as an agent of Big Bear. The agreement is in many respects patterned after a contract that has been held by the Board in *Southland Corporation*, 170 N.L.R.B| 1332 (1968), to afford the franchise the status of an independent contractor. However, the La Mesa franchise agreement departs significantly from the *Southland* agreement in its provisions relating to rent, advertising, termination of the agreement, and inventory.

The franchise agreement allows Big Bear to retain significant control over the operations of the La Mesa store with respect to product lines, advertising, honoring of advertised specials and discount coupons, issuance of trading stamps, and supervision and technical assistance. Although Holmes, as franchisee, is allowed to exercise some managerial discretion not granted to managers of Big Bear markets, in many circumstances he must obtain approval from Big Bear before exercising that discretion, and failure to obtain such approval is cause for termination of the

franchise agreement. The La Mesa market retains its appearance as part of the Big Bear system.

Holmes has full control over the hiring and firing, work schedules, working conditions, and compensation of the new employees a the La Mesa market. The new employees earn lower wages and benefits than are provided for in the collective agreements.

Of particular importance are the financial provisions of the franchise agreement. Holmes leases the premises and equipment at the La Mesa market from Big Bear. He purchased $116,400.81 in inventory with an unsecured promissory note for that amount and a down payment of $2,000 on the note. The note bears an interest rate of 5%, and the franchise agreement provides for periodic payments on the note, partially based on Holmes's net earnings, with no apparent time limit for repayment.[2]

Big Bear performs accounting services for Holmes through a system known as the Open Account. Big Bear pays the expenses for the operation of the La Mesa market, debiting that amount to the Open Account; Holmes deposits his daily sales receipts with Big Bear, resulting in a credit to the Open Account. Because many operation expenditures necessarly precede sales receipts from the market's operation, the

[2]The Board found an apparent error in the decision of the ALJ with respect to the extent that Holmes made principal payments on the note in excess of the payments required by the agreement. We find this disagreement between the Board and ALJ to be immaterial.

Open Account provides Holmes with an interest-free advance of funds for business expenses.[3]

The franchise agreement provides that Big Bear will remit to Holmes, and debit to the Open Account, a weekly "draw on anticipated profits" in the amount of $425, roughly equivalent to salaries earned by managers of Big Bear stores. This amount is guaranteed regardless whether any profit is currently earned by the La Mesa market.

Nothing in the express provisions of the franchise agreement shifts from Holmes the ultimate risk of loss if the market fails, but Big Bear apparently is obligated to carry losses forward through the Open Account until the agreement is terminated for cause. Although Big Bear may sue Holmes on the promissory note in the event of failure of the La Mesa market, the note is not secured by any of Holmes's property to protect Big Bear from absorbing possible losses. Profits earned through operation of the market are divided between Big Bear and Holmes, 40% to Big Bear and 60% to Holmes.

On these facts, the ALJ concluded that the franchise arrangement was an arm's length transaction motivated by legitimate business considerations. Accordingly, he rejected the General Counsel's alter ego theory and recommended dismissal of the complaint.

[3] Holmes asserts that Big Bear benefits from the interest-free use of funds from sales receipts deposited into the Open Account daily by Holmes. However, Big Bear would enjoy a net benefit only if Holmes's share of the profits deposited in the Open Account exceeded the operating expenses advanced by Big Bear. There is no indication in the record that such was the case.

Contrary to the ALJ, the Board concluded that the franchise agreement was a sham transaction, that Holmes is Big Bear's alter ego with respect to the La Mesa store, and that Holmes and Big Bear constitute a single employer under section 2(2) of the Act. The Board found that Big Bear violated section 8(a)(1) & (5) by refusing to recognize or bargain with the Unions with respect to the La Mesa market, by refusing to apply the terms of the collective agreements to the new La Mesa employees, and by refusing to supply the Retail Clerks Union with the requested information about the new employees. Additionally, the Board found that Big Bear violated section 8(a)(1) & (3) by transferring the former La Mesa employees because of their union representation. The Board ordered Big Bear to cease committing the unfair labor practices and to engage in affirmative remedial action. The Board's decision is reported at 239 N.L.R.B. No. 26 (1979).

The Board petitions for enforcement of its order pursuant to 29 U.S.C. § 160(e). We granted the motion of the Meat Cutters Union to intervene in the enforcement proceedings.

II.

STANDARD OF REVIEW

We must enforce the Board's order if the Board correctly applied the law and if the Board's findings of fact are supported by substantial evidence on the

record viewed as a whole. *Los Angeles Marine Hardware Co.* v. *NLRB*, 602 F.2d 1302, 1305 (9th Cir. 1979); *Loomis Courier Serivce, Inc.* v. *NLRB*, 595 F.2d 491, 494 (9th Cir. 1979). Because the ultimate findings of the Board are contrary to those of the ALJ, we must pay particular attention to the standard of review of the Board's findings of fact.

The standard of review does not change merely because the Board reaches a conclusion contrary to that of the ALJ. *Id.* at 495; *NLRB* v. *Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978). The ALJ's decision is part of the record and necessarily detracts from the support for the Board's contrary decision, but the Board's findings of fact must be upheld if supported by substantial evidence on the record as a whole. *Id.* Moreover, in light of the special expertise of the Board, we will defer to the reasonable derivative inferences drawn by the Board from credited evidence. *Penasquitos Village, Inc.* v. *NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977); *see Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951); *NLRB* v. *Lantz*, 607 F.2d 290, 297 (9th Cir. 1979).

On the other hand, because the ALJ sees and hears the witnesses, he or she is in the best position to draw testimonial inferences and to make findings with respect to credibility. *Pensaquitos Village*, 565 F.2d at 1078-79. Consequently, credibility resolutions of the ALJ are entitled to special weight, and findings

of the Board that are contrary to those credibility resolutions will be subjected to particularly critical scrutiny. *See id.* at 1079; *Loomis*, 595 F.2d at 495-96; *Butler-Johnson Corp.* v. *NLRB*, 608 F.2d 1303, 1305 (9th Cir. 1979).

III.

SINGLE-EMPLOYER STATUS

The Board's findings of unfair labor practices are premised on its conclusion that Big Bear and Richard Holmes constitute a single employer within the meaning of section 2(2) of the Act.[4] In *NLRB* v. *Don Burgess Construction Corp.*, 596 F.2d 378 (9th Cir.), *cert. denied*, 100 S.Ct. 293 (1979), we set forth the factors to be considered by the Board in determining whether to treat two or more distinct business entities as a single employer:

> [T]he criteria to which the Board looks in order to determine single employer status are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. The Board has stressed the first three of these factors, as well as the presence of control of labor relations. However, no one of the factors is controlling, nor need all criteria be present. Single employer status ultimately depends on "all the circumstances of the case" and is

[4] Section 2(2) provides in part:
"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly. . . ."

> characterized as an absence of an "arm's length relationship found among unintegrated companies."

Id. at 384 (citations omitted). *Accord, Lantz* 607 F.2d at 295.[5] The Board's conclusion that Big Bear and Holmes constitute a single employer "is essentially a factual one and not to be disturbed provided substantial evidence in the record supports the Board's findings." *Id.*

The findings of the ALJ and the Board are consistent with respect to the facts relevant to the first criterion of the single-employer test, interrelation of operations. The business purpose, equipment, and customers of the La Mesa market remained substantially the same before and after the franchise arrangement, and Big Bear performed accounting services for Holmes. These factors show a sufficient degree of interrelation of operations to favor a finding of single-employer status. *Cf. Marine Hardware Co.*, 602 F.2d at 1305 (same customers; central preparation of pay-

[5]The Board did not list the specific criteria that it considered in determining single-employer status; rather it based its finding of a single employer in this case primarily upon its conclusion that the franchise agreement was a sham transaction. The ALJ applied the "alter ego" test set forth in *Crawford Door Sales Co.*, 226 NLRB 1144 (1976), which calls for substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. These are essentially the same factors that are examined in evaluating the four criteria of the "single-employer" test set forth in our decision in *Don Burgess. See generally Naccarato Construction Co.*, 233 N.L.R.B. 1394, 1398 (1977). We have applied the *Don Burgess* test to cases involving a business firm that takes over the operations of a predecessor entity, *e.g., Marine Hardware Co.*, 602 F.2d 1302, and those involving concurrently operating, interrelated enterprises, *e.g., Lantz*, 607 F.2d 290. In each case, the ultimate question is whether the business entities in question constitute a single employer within the meaning of section 2(2) of the Act; the criteria of the *Don Burgess* test is sufficiently flexible to permit its application to varying fact situations.

roll and financial statements); *Don Burgess*, 596 F.2d at 385 (same equipment and accounting service, among other factors).

The ALJ and the Board are not in agreement in their evaluation of the facts relating to the second criterion, common management. The ALJ characterized Big Bear's supervision of the La Mesa market as "technical assistance" that did not favor a finding of single-employer status. The Board, on the other hand, found that "Big Bear retains under the contract terms a substantial number of controls over the operation of the La Mesa store," so that "the franchised store continues to operate essentially as any other Big Bear market, with Big Bear actively exercising its contractual prerogatives." The franchise agreement specifically permits Big Bear to exercise limited control over several aspects of the operation of the La Mesa market. In addition, the agreement includes a general clause relating to supervision:

> Big Bear shall provide such supervision and technical assistance to [Holmes] as may be reasonably necessary to establish the business, and in any event no less supervision than is provided to other markets in the Big Bear system.

The record shows that to a significant degree Big Bear exercised the control granted to it in the agreement. The Board's characterization of Big Bear's control over the La Mesa market is the product of reasonable derivative inferences drawn from credited

evidence. We find that the common-management criterion favors a finding of single-employer status.

The critical criterion in this case, and the one causing the greatest disagreement between the ALJ and the Board, is that relating to common ownership or financial control. Whereas the ALJ found that the franchise agreement validly transferred ownership of the La Mesa market from Big Bear to Holmes, the Board concluded that the agreement was a sham transaction executed for the purpose of permitting Big Bear to evade its collective bargaining obligations.

The record supports the Board's finding that the franchise arrangement was not executed for valid business considerations. The Board correctly notes in its decision that the franchise arrangement did not create a remedy for the principal financial problem at the La Mesa store, lack of parking space. Instead, the agreement allowed Holmes to reduce operating expenditures through avoidance of the terms of the collective agreements. Moreover, the Board reasonably inferred that one of the reasons Big Bear unconditionally transferred the union employees from the La Mesa market was to help Holmes avoid the status as a "successor employer" with concomitant bargaining obligations.[6]

[6] Even in the case of a bona fide transfer of assets, a successor employer may be held to the bargaining obligations of its predecessor if there is a substantial continuity of identity of the workforce. *See Howard Johnson Co.* v. *Hotel & Restaurant Employees*, 417 U.S. 249 (1974).

Finally, the financial provisions of the agreement are uncharacteristic of a bona fide transfer of ownership. For a small initial capital investment of $2,000, Holmes assumed nominal ownership of a business with an inventory valued at more than $100,000 and with annual sales of more than $1,000,000. Big Bear advances the operating expenses for the La Mesa market, including a guaranteed salary for Holmes commensurate with the salaries earned by managers of other Big Bear stores. Big Bear claims a substantial portion of the profits earned by the La Mesa store as its franchise fee. Although Holmes bears ultimate responsibility for losses suffered by the La Mesa market, the obligation is unsecured and Big Bear's ability to avoid absorbing losses is dependent upon Holmes's personal financial solvency and ability to repay the promissory note in the event of failure of the market.

The ALJ's conclusion that the franchise agreement was executed for legitimate business considerations appears to be based partly on the ALJ's determination to credit the testimony of President Mabee on that issue, as well as on the ALJ's interpretation of the franchise agreement. The Board's conclusion is based principally upon the franchise agreement itself and the method in which business was conducted under the franchise agreement. The Board drew different derivative inferences from these undisputed historical facts than did the ALJ. Even giving deference to the ALJ's finding concerning the credibility

of Mabee's expressed intention, there is sufficient evidence from which the Board could reasonably have found to the contrary. Accordingly, we uphold the Board's finding that the franchise arrangement was a sham transaction executed for the purpose of evading Big Bear's bargaining obligations. We find that the criterion relating to common management or financial control favors a finding of single-employer status.

The remaining criterion, control over labor relations, is ordinarily accorded special significance. *See, e.g., Marine Hardware Co.*, 602 F.2d at 1305. Holmes exercised full control over labor relations at the La Mesa market after the union employees were transferred, and Big Bear argues that this precludes a finding of single-employer status.

The Board, however, gave little weight to Holmes's exercise of control over labor relations, due to its finding that the franchise agreement was not a bona fide, arm's length transaction. We uphold this application of the law by the Board. The presence of all four criteria of the single-employer test is not necessary to a finding of single-employer status; the ultimate question is whether there is an absence of an arm's length relationship between the business entities in question. *Don Burgess*, 596 F.2d at 384. It would make little sense to give weight to Holmes's control over labor relations in light of the Board's supportable finding that the purpose of the franchise

agreement was the evasion of bargaining obligations; transfer of control over labor relations from Big Bear to Holmes helped to effectuate that improper purpose.

Viewing the record as a whole, we find that substantial evidence supports the Board's finding that Big Bear and Holmes constitute a single employer within the meaning of section 2(2) of the Act.

IV.

UNFAIR LABOR PRACTICES

A. Transfer of the La Mesa Employees

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their statutory rights to engage in or refrain from engaging in concerted activity for the purpose of organizing or bargaining collectively. 29 U.S.C. §§ 157, 158(a)(1). Section 8(a)(3) provides that it shall be an unfair labor practice for an employer to engage in employment discrimination to encourage or discourage membership in any labor organization. 29 U.S.C. § 158(a)(3).

We find that substantial evidence supports the Board's finding that Big Bear violated section 8(a)(1) & (3) by transferring the union employees from the La Mesa market. A finding of a violation of section 8(a)(3) ordinarily requires specific proof of antiunion animus on the part of the employer. *See*

Marine Hardware Co., 602 F.2d at 1307. Because we uphold the Board's finding that Big Bear franchised the La Mesa store for the purpose of evading its bargaining obligations with the Unions, and because the transfer of the union employees formed an integral part of the scheme to transform the La Mesa market into a nonunion shop, we find the requisite proof of antiunion animus. The transfer therefore constituted unlawful employment discrimination in violation of the Act. *Cf. id.* (discharge of employees was "inherently destructive," obviating need for specific proof of animus).

B. Breach of Bargaining Obligations

Section 8(a)(5) of the Act provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. 29 U.S.C. § 158(a)(5). The Board found that, within the job classifications covered by the collective agreements, the employees at the La Mesa market and the employees at the other Big Bear markets constitute an appropriate bargaining unit. We uphold that determination as a proper exercise of the Board's discretion.[7] Therefore, because we

[7] An element in addition to the four criteria of the single-employer test must be present before the Board may impose the terms of a collective bargaining agreement signed by one of the business entities upon the nonsignatory entity. *See generally Naccarato*, 233 N.L.R.B. at 1398-99. To justify that remedial action, we have held that the employees of each business entity must constitute an appropriate bargaining unit. *Don Burgess*, 596 F.2d at 386. In this case, the Board adopted the multi-store bargaining unit stipulated by the parties to be appropriate. Moreover, we note that the Board's order does not operate directly against Holmes, the nonsignatory party. Rather, the Board found that Big Bear, as the continuing employer of the La Mesa employees, unlawfully repudiated the collective agreement to which it was a party.

uphold the Board's finding that Big Bear and Holmes constitute a single employer, we find that the record supports the Board's findings that Big Bear breached its bargaining obligations.

Big Bear's refusal, through Holmes or other agents, to recognize or bargain with the Unions with respect to the new employees at the La Mesa market constitutes an obvious violation of section 8(a)(1) & (5). Furthermore, Big Bear's refusal to apply the terms of the collective agreements to the new employees constitutes a mid-term repudiation of the agreements in violation of section 8(a)(1) & (5). *See Marine Hardware Co.*, 602 F.2d at 1306-07; *Lantz*, 607 F.2d at 299-300. Finally, it is not disputed that the request of the Retail Clerks Union for the names and addresses of the new employees was necessary for bargaining purposes; therefore, Big Bear violated section 8(a)(1) & (5) by failing to supply the requested information. *See Standard Oil Co.* v. *NLRB*, 399 F.2d 639 (9th Cir. 1968).

The Board correctly applied the law, and substantial evidence on the record as a whole supports its findings of fact. Therefore, we affirm the Board's findings of unfair labor practices.

PETITION FOR ENFORCEMENT GRANTED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed June 9, 1980, Richard H. Deane, Clerk

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* VS. BIG BEAR SUPERMARKETS NO. 3 and its alter ego RICHARD HOLMES, *Respondent.*	No. 79-7100 NLRB CASES 21-CA-15605 21-CA-15703 ORDER

APPLICATION FOR ENFORCEMENT OF AN ORDER NATIONAL LABOR RELATIONS BOARD

Before: GOODWIN, HUG and SKOPIL, Circuit Judges.

The Opinion previously filed herein shall be amended as follows:

1. At slip op. 2598, at the end of the first paragraph in column 2, after the word "purpose", add the designation for footnote 7. The text of footnote 7 should read as follows:

> 7. Big Bear relies heavily on *NLRB* v. *Transcontinental Theaters, Inc.*, 568 F.2d 125 9th Cir. 1978), in which we declined to uphold the Board's finding of single-employer status. However, the factual situation in

Transcontinental and this case are quite different. Each case turns upon the facts. In this case, the factual pattern does present substantial evidence from which the Board could reasonably conclude that the major motivation for the franchise arrangement was to avoid the collective bargaining obligations.

2. At slip op. 2599, in the fourth line of column 2, after the word "discretion", the designation for footnote 7 should be changed to 8; footnote 7 appearing at the end of column 1 should likewise be changed to 8.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner.* VS. BIG BEAR SUPERMARKETS NO. 3 and its alter ego RICHARD HOLMES, *Respondent.* AMALGAMATED MEAT CUTTERS & BUTCHERS WORKERMEN OF NORTH AMERICA, AFL-CIO, *Intervenor.*	No. 79-7100

JUDGMENT

Before: GOODWIN, HUG, and SKOPIL, Circuit Judges.

THIS CAUSE came on to be heard upon the application for enforcement of an order of the National Labor Relations Board dated November 1, 1978, against Respondent, Big Bear Supermarkets No. 3 and its *alter ego*, Richard Holmes, La Mesa, California, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on January 9, 1980, and has considered the briefs and transcripts of record filed in this cause. On April 2, 1980, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that:

Respondent, Big Bear Supermarkets No. 3 and its *alter ego*, Richard Holmes, its officers, agents, successors, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Retail Clerks Union, Local 1222, Retail Clerks International Union, AFL-CIO, herein referred to as Local 1222 and Local 229, (hereinafter called the Union), as the exclusive bargaining representatives of the employees in the units set forth in their respective collective-bargaining agreements with Respondent, including the unit employees at the La Mesa store, by withdrawing recognition from and refusing to recognize those Unions as the exclusive bargaining representatives of the employees in the separate units at the La Mesa store.

(b) Unilaterally changing the terms and conditions of employment established by its collective-bargaining agreements with the Unions by refusing to apply the terms of collective-bargaining agreements with those Unions to its employees in the separate units at the La Mesa store.

(c) Refusing to furnish to Local 1222 the names and addresses of employees included in its bargaining unit at the La Mesa store as requested by that Union.

(d) Transferring employees of the La Mesa store to other stores within the multistore units because they are represented by the Unions.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act, (hereinafter called the Act).

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and bargain collectively with Local 1222 as the exclusive representative of the employees of Respondent at the La Mesa store in a unit of all hourly employees working in the job classifications enumerated in its collective-bargaining agreement with the Union, effective from July 28, 1975, to July 30, 1978, at its retail grocery and meat markets in San Diego County, and apply the collective-bargaining agreement with the Union to the unit employees at the La Mesa store, retroactive to November 15, 1976.

(b) Recognize and bargain collectively with Local 229 as the exclusive representative of the employees of Respondent at the La Mesa store in a unit of all hourly employees working in the job classifications enumerated in its collective-bargaining agreement with that Union, effective from November 8, 1976,

to November 4, 1979, at its retail grocery and meat markets in San Diego County, and apply the collective-bargaining agreement with the Union to the unit employees at the La Mesa store, retroactive to November 15, 1976.

(c) Make the employees at the La Mesa store in the aforesaid units whole for any losses they may have suffered since November 15, 1976, as a result of Respondent's failure to apply the collective-bargaining agreements to them, in the manner set forth in the section of the Decision and Order entitled "The Remedy" (attach [sic] hereto and marked Appendix A).

(d) Supply Local 1222 with the names and addresses of employees included in its bargaining unit at the La Mesa store, as requested by it.

(e) Offer employees of the La Mesa store who were transferred to other stores of Respondent within the multistore bargaining units immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, displacing if necessary any employees assigned to those positions since November 15, 1976, without prejudice to their seniority or other rights and privileges, and make whole the transferred employees or any other unit employees for any losses they may have suffered as a result of Respondent's unlawful transfers in the manner set forth in the section of the Decision and Order entitled "The Remedy."

(f) Preserve and, upon request, make available to the Board or its agents, for examination or copying, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this judgment.

(g) Post at all Big Bear Supermarkets in San Diego County, California, copies of the attached notice marked "Appendix B." Copies of said notice, on forms provided by the Regional Director for Region 21, (Los Angeles, California) of the National Labor Relations Board after being dully signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this judgment, what steps the Respondent has taken to comply herewith.

SO ORDERED.

BIG BEAR SUPERMARKETS No. 3

BIG BEAR SUPERMARKETS No. 3, La Mesa, Calif. and RETAIL CLERKS, LOCAL 1222, RCIA, AFL-CIO and MEAT CUTTERS, LOCAL 229, AFL-CIO. Case Nos. 21-CA-15605 and 15703, November 1, 1978, 239 NLRB No. 26.

Judith A. Williams, Los Angeles, Calif., for General Counsel; Douglas F. Olins (Olins & Foerster), San Diego, Calif., for Retail Clerks; Richard D. Prochazka (Domnitz and Prochazka), San Diego, Calif., for Meat Cutters; Raymond T. Theep, San Diego, Calif., for employer; Edwin C. Schreiber (Keltner & Schreiber), Beverly Hills, Calif., for Richard Holmes, Intervenor; Administrative Law Judge Roger B. Holmes.

Before NLRB: Jenkins, Murphy, and Truesdale, Members.

EMPLOYER Sec. 2(2)—Alter Ego

Corporation and individual to whom it franchised one of its stores constitute single employer, since arrangement was not bona fide franchising transaction, individual's position essentially was that of manager, and he was in fact corporation's alter ego with respect to store. It is noted that individual was son of high corporate officer and shareholder, that corporation retained and exercised various controls over operation of store, and that individual initially invested only $2,000 cash, with corporation financing

operation of store without charging interest to individual.

REFUSAL TO BARGAIN Sec. 8(a)(5) EMPLOYER Sec. 2(2)
Withdrawal of Recognition—Application of Contract—Alter Ego

Employer violated LMRA when, after franchising store to individual who is its alter ego, it withdrew recognition from and refused to recognize unions representing store's employees and refused to apply terms of collective bargaining agreements to these employees.

Request for Information

Employer violated LMRA by refusing to furnish union with names and addresses of bargaining-unit employees at store which had been franchised to employer's alter ego.

DISCRIMINATION Sec. 8(a)(3) REFUSAL TO BARGAIN Sec. 8(a)(5) EMPLOYER Sec. 2(2)
Transfer of Employees—Alter Ego

Employer violated Section 8(a)(3) of LMRA when, after franchising union-represented store to individual who is its alter ego, it transferred this store's employees to other stores because of union representation at franchised store. However, transfers did not violate Section 8(a)(5) of Act, since corporation and individual are single employer, and corporation's collective bargaining contracts provide for

employee transfers between stores without prior consultation with unions.

[*Text*] Respondent, a corporation engaged in the operation of retail grocery markets in San Diego County, California, owns and operates a chain of approximately 22 supermarkets, known as Big Bear markets, in that area. The corporate entity, designated as Big Bear Supermarkets No. 3, additionally owns and operates a number of other businesses.[2] Big Bear Supermarkets No. 3 has, since at least 1957 and 1950, respectively, been party to successive collective-bargaining agreements with Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, herein called Local 1222 and Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, herein called Local 229, covering multistore bargaining units at its retail grocery and meat markets in San Diego County.[3] Prior to November 15, 1976, Respondent applied its contracts with Local 1222 and Local 229 to bargaining unit employees covered by these contracts at all Big Bear markets in San Diego County.

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[2] These include six other grocery stores and markets operated under the trade names of Market Place and Cooks Markets, nine Daisy's Restaurants, and 15 Par Liquor Stores, as well as several shopping centers.

[3] Respondent's contracts with Local 1222, the most recent of which is effective from July 28, 1975, to July 30, 1978, set forth the specific job classifications constituting the unit appropriate for collective bargaining. Respondent's contracts with Local 229, the most recent of which is effective from November 8, 1976, to November 4, 1979, likewise set forth the job classifications included in the appropriate bargaining unit.

Effective November 15, 1976, Respondent franchised its Big Bear store 13, located in La Mesa, California, to Richard Holmes, the Intervenor in this proceeding. Richard Holmes, a former store manager at another of Respondent's Big Bear markets, is the son of Gerald Holmes, a corporate officer of Respondent,[4] who is a 5-percent shareholder of Big Bear Supermarkets No. 3. Respondent had not previously, nor has it since, franchised any other of its operations.

Under the terms of the franchise agreement executed by the parties on November 8, 1976, Richard Holmes has exclusive control over the labor relations of the La Mesa store. In preparation for taking over the store's operation, Holmes recruited and hired a new complement of employees for that store, paying them wages and benefits less than those required under Respondent's' union contracts. The 12 Big Bear employees working in the La Mesa store were transferred by Respondent to other of its Big Bear markets before Holmes commenced operation of the store as franchisee. Only one former employee of store 13, a part-time janitor who was not included in the bargaining unit under either of Respondent's union contracts, was retained by Holmes at the franchised store.

The parties have stipulated that Respondent's employees at the La Mesa store were transferred to other Big Bear stores without being given the opportunity to seek continued employment at the franchised

[4]Gerald Holmes is Respondent's general manager and secretary-treasurer, as well as a member of the corporation's board of directors.

store, as we note is required by Respondent's contract with Local 1222.[5] The parties have further stipulated that Respondent neither notified nor bargained with the Unions representing these employees regarding the employees' transfer either before or after the transfers occurred. The parties additionally stipulated that Richard Holmes has refused to recognize either Local 1222 or Local 229 as the bargaining representative of the employees at the franchised store, and has also refused to apply the terms of Respondent's contracts with these Unions to the employees at the La Mesa store. He has declined as well to supply Local 1222 with the names and addresses of the store's current employees in the job classifications included in its bargaining unit when such information was requested by that Union. As a result of the employee transfers and of franchisee Holmes' subsequent refusal to recognize and bargain with these Unions as representatives of the employees at store 13, or to abide by the terms of Respondent's collective-bargaining agreements with Local 1222 and Local 229, both Unions filed the instant unfair labor practice charges.

The Regional Director for Region 21 consolidated the two cases and, on June 9, 1977, issued an amended complaint alleging that the La Mesa store is an alter

[5] Art. XIX(D) of Respondent's contract with Local 1222 states as follows:
"D. SALE OR TRANSFER: 1. In the event of a sale or transfer of a store or stores, an employee shall be allowed a seven (7) day period from the date of announcement to the employees of the sale or transfer during which time he may determine whether he wishes to stay with the seller or whether he wishes to make application for employment with the new owner or transferee. In the event the employee chooses to remain with the seller, such choice shall not be construed as any guarantee of employment over and beyond the terms of this Agreement."

ego of Big Bear Supermarkets No. 3. The gravamen of the General Counsel's contention is that Respondent's purported franchising of store 13 to Richard Holmes was, in actuality, a sham transaction motivated by Respondent's desire to transform a losing operation into a profitable one by avoiding its obligation to pay contractually agreed to union wages and benefits. Specifically, the General Counsel alleges that Big Bear retained and exercises such extensive control over the franchised operation as to render it in effect a subordinate entity and disguised continuance of Big Bear Supermarkt No. 3. Thus, the complaint alleges that Respondent violated Section 8(a)(1), (3), and (5) of the Act by refusing to bargain with Local 1222 and Local 229 as representatives of the employees at the La Mesa store; by refusing to honor its collective-bargaining agreements with these Unions with regard to those same employees; by withdrawing recognition from the Unions as collective-bargaining representatives of the employees in the separate units at the La Mesa store; by unilaterally transferring the previous employees of the La Mesa store to other stores of Respondent within the multi-store bargaining units, and without bargaining with the Unions over such transfers, because of their union representation; and by refusing to furnish Local 1222 with the names and addresses of current employees of the La Mesa store in job classifications included in its bargaining unit when such information was requested by that Union.

The Administrative Law Judge, rejecting the General Counsel's alter ego contention, dismissed the complaint in its entirety. Analyzing the instant case in terms of whether the two enterprises have substantially identical ownership and control and common business purpose, management, operations, equipment, customers, and supervision, the Administrative Law Judge concluded that these factors did not preponderate in favor of finding Richard Holmes to be the alter ego of Big Bear Supermarkets No. 3.[6] Nor, he concluded, did the evidence establish the selection of Holmes as franchisee to be a subterfuge by which Respondent would continue to operate the store. In addition, the Administrative Law Judge found that neither the transfer of all union-represented employees at the La Mesa store to other stores in Respondent's chain nor Respondent's failure to notify and bargain with the Unions representing those employees regarding their transfer and change in status of the store violated the Act. For the reasons set forth below, we disagree with certain of these conclusions, and therefore find that Respondent committed certain of the unfair labor practices alleged.

The Alter Ego Issue: The La Mesa store, as indicated in the Administrative Law Judge's Decision more fully describing the facts in this proceeding, is located in a shopping center which Respondent owns.

[6]These factors have previously been identified as being generally indicative of alter ego status. Crawford Door Sales Company, Inc. and Cordes Door Company, Inc., 226 NLRB 1144, 94 LRRM 1393 (1976); Marquis Printing Corporation and Mutual Lithograph Company, 213 NLRB 394, 87 LRRM 1642 (1974).

This particular shopping center has been subject to three separate freeway construction condemnation proceedings by the State of California, shrinking its size from a total of some 13 acres in 1950 to less than two acres in 1976. The most recent condemnation and road construction, occurring in 1975-76, resulted in an approximate 25-percent sales drop for store 13, and in the elimination of a substantial portion of the store's parking area. Profit and loss statements show that the store declined from a fiscal 1974 profit of $1,580 to a fiscal 1975 loss of $52,507 and a fiscal 1976 loss of $55,320.

It was these financal losses, along with economic difficulties at some of its other operations, which Respondent asserts precipitated its decision to franchise the La Mesa store. Further influencing that decision, Respondent maintains, was its desire to retain its overall market share of the grocery business in San Diego County, and the need to keep the Big Bear name in its shopping center as a customer-drawing factor for the benefit of its tenants in other stores and shops in the center. Thus, Respondent claims, the franchising of the store was a bona fide, arm's length business transaction motivated by a desire to minimize its financial losses while achieving these related business objectives.

Selected by Respondent as franchisee was Richard Holmes, an employee of Big Bear Supermarkets No.3

since 1969. The son of Gerald Holmes, a major officer and a shareholder of Respondent,[7] Richard Holmes was until November 1976 manager of a high volume Big Bear market in El Cajon. His ability to continue in that capacitiy was, unfortunately, limited by the fact that he is a victim of multiple sclerosis. The effects of this disease had necessitated his taking a leave of absence of about four months in 1975, and Holmes testified that the disease was affecting his ability to perform as a Big Bear manager in 1976. Rated by the Veterans Administration as 30-percent disabled, Holmes testified that multiple sclerosis is generally a progressive disease, depending upon the person and the kind of pressure he is under. Holmes has been aided in the operation of the franchised store by his wife and mother, who have worked at the store without pay.

The franchise agreement executed by the two parties was, according to Respondent's attorney who prepared the document, patterned after a 1966 copy of a Southland Corporation franchise agreement for a 7-Eleven store which the Board had found to create an independent contractor relationship between a franchisor and its franchisee.[8] While identifying several areas in which modifications to that document were made, including rent, advertising, termination,

[7] Approximately 80 percent of the stock of Big Bear Supermarkets No. 3 is owned by its president, John Mabee, with Gerald Holmes owning about 5 percent, and the remaining 15 percent being held primarily by supervisors of Respondent.

[8] The Southland Corporation, d/b/a Speedee 7-Eleven, 170 NLRB 1332, 67 LRRM 1582 (1968).

and inventory, Respondent avers that it basically merely incorporated the provisions of Southland's agreement in drafting Big Bear's franchise and leasing agreements.[9] * *

As a review of this agreement reveals, Big Bear retains under the contract terms a substantial number of controls over the operation of the La Mesa store. Thus, the agreement provides, for example, that (1) the La Mesa store is to be operated as part of Respondent's system of Big Bear stores; (2) Holmes is specifically obligated to carry such product lines as are customarily carried in the Big Bear system, and in such quantities as are reasonably necessary, *in the sole judgment of Big Bear*, to meet customer demands; (3) Holmes must obtain permission from Big Bear before changing any product line customarily carried in the Big Bear system; (4) Big Bear has the authority to contract for such advertising as it deems sufficient *in its sole judgment* and, while Holmes may purchase such additional advertising as

[9] While we do not find it necessary to our decision herein to engage in an extensive comparison and analysis of the Big Bear and Southland Corporation agreements, we note significant variations between the two. Southland franchisees, for example, are required to pay a cash initial franchise fee at contract execution, as well as provide cash operational capital as an initial investment. They are also charged interest on open account items advanced by Southland, if they desire to finance their operation through Southland rather than from some other source. Big Bear, as discussed infra, has markedly different provisions regarding these items. (Any thorough and accurate comparison of Big Bear's contract with the Southland agreements, asserted by Respondent to have been its model, is precluded, however, by the fact that Respondent introduced into evidence only a copy of a Southland agreement dated July 1977, and the 1966 version claimed as the prototype for Big Bear's franchising contract was not made available as record evidence.) In any event, given the overall facts of this case, we do not find the situation of the Southland Corporation, which is an acknowledged entity in the franchising industry, to be analogous to that of Big Bear, which is not in the business of franchising and, indeed, aside from the La Mesa store has made no attempt to franchise its business units.

he may desire, that advertising must be approved in writing by Big Bear and may not, in *the sole judgment of Big Bear*, be inconsistent with its advertising purposes; (5) Holmes must stock and sell advertised goods at the advertised prices and honor discount coupons contained in Big Bear advertisements; (6) Holmes is obligated to purchase and distribute trading stamps for so long as Big Bear gives them; and (7) Big Bear reserves the right to provide Holmes with supervision and technical assistance, and *in any event with no less supervision than is provided to other markets in the Big Bear system.* Holmes is moreover precluded from assigning, encumbering, mortgaging, pledging, or hypothecating his interest in the leasehold estate or equipment (although Big Bear's right to take the same actions with regard to the store's equipment and fixtures is retained), and from selling, transferring, or assigning his interest in the contract as well. A termination clause provides that Holmes may lose his franchise if he fails to request and receive any approvals required by the agreement, among several listed conditions justifying termination. Thus, the franchised store continues to operate essentially as any other Big Bear market, with Big Bear actively exercising its contractual prerogatives.

Also of import, particularly since Respondent asserts that the franchising resulted from valid economic considerations, are the financial provisions underpining the franchising agreement. For a downpayment of $2,000 and the execution of an unsecured promissory note in the amount of $114,400.81, Holmes took over a $116,400.81 inventory of goods and became the putative owner of this ongoing business operation having an annual sales volume well in excess of $1 million.[10] According to article 19 of the agreement, outlining the operation of the owner's open account, Big Bear pays for all expenditures required to be made in the operation of the business, and debits these to Holmes' open account. There is no requirement for the payment of interest on this account; therefore, Big Bear in actuality advances interest-free all moneys required for the store's operation—including so-called owner's investment costs of permits, transfer fees, business licenses, and "set up" fees.[11] Big Bear then collects and deposits Holmes' daily sales receipts, credits this income to Holmes' open account and by virtue of the accounting services which it also provides determines the quartely and, finally, yearly net

[10] The value of "goodwill" accruing to the new owner in his assumption of the business is not financially recognized in this document. In marked contrast, the purchase prices of two stores recently sold by Respondent included amounts of $40,000 and $100,000, respectively, over and above the value of inventory transferred.

[11] Art. 18 of the agreement, which is not among those provisions included in the Administrative Law Judge's Decision, states as follows:
"18. OWNER'S INVESTMENT. OWNER shall pay for all permits, transfer fees, business licenses, or any other 'set-up' fees that may be necessary to take over the store and operate it. In addition, OWNER agrees to pay to BIG BEAR the cost of opening inventory as is provided in paragraph 17 above. These amounts shall constitute the OWNER'S investment. These costs shall be debited to OWNER'S Open Account as provided above."

operating income for apportionment between it and Holmes. As consideration for the lease, franchise, license agreement, utilities, and services to be performed by Big Bear, the agreement requires that Big Bear be paid a "Big Bear Charge" consisting of 40 percent of Holmes' net operating income.[12]

Interspersed throughout the agreement are provisions whereby Big Bear commits itself to pay various items to be borne by Holmes under the contract's terms, debiting these payments to Holmes' noninterest-bearing open account. Thus, Big Bear obligates itself to pay all bills, invoices, or other obligations Holmes is required to pay under the maintenance and repair provisions for the leased premises and equipment; the rent itself for the building and fixtures is debited to the open account (since Big Bear owns the leased building and fixtures, it is in effect advancing the economic costs of these items by debiting Holmes' account); Big Bear agrees to advance Holmes sufficient sums to obtain all permits and licenses required by law for the store's operation; Big Bear agrees initially to arrange for fire and casualty insurance, debiting its cost to the open account; Big Bear is required, in addition to paying real property taxes under the agreement, to make the actual tax payments for Holmes' personal property taxes on the inventory and equipment, as well as the businesses' sales taxes, again debiting the open account; Holmes' pro rata share of the advertising and supervision Big Bear

[12] Net operating income is defined as "gross gain less operating expenses."

provides is to be debited to the account; Big Bear is obligated to pay and debit to his open account Holmes' state unemployment insurance, social security, payroll insurance, workmen's compensation insurance, and any other similar expenses relative to Holmes' employment relationship. As is apparent from all of the above, it is Big Bear and not Holmes providing the capital to operate the La Mesa store. Holmes would moreover appear under the agreement's terms to have no choice of obtaining his financing from any other source, a fact which we note without comment other than the observation that he would not appear likely to desire other financing with Big Bear financing the store's operation interest free. It is, of course, relevant to a consideration of the alleged bona fide nature of the franchising transaction.

Holmes' unsecured $114,400.81 promissory note in payment for the store's initial inventory is payable $500 or more monthly, including interest at the rate of 5 percent per annum, until the note has been paid in full. At the end of each quarterly accounting, Holmes is required to make a principal payment on this note in an amount equal to 50 percent of his net profit until the cost of the initial inventory has been paid in full. There is no time limit as to when this principal amount must be fully paid. The Administrative Law Judge found it significant that Holmes had applied his total net profits, rather than only the half required by the contract, to the repayment of the principal on this note, as indicative that

Holmes is truly a franchisee and the agreement is not a sham. A review of the record, however, indicates that the Administrative Law Judge was factually in error in this regard. Whereas Holmes did apply his total quarterly profits to payment of the principal on January 13 and April 20, 1977, on July 31, 1977, he paid on the note's principal only the half of his net profits mandated by the contract. Thus, whatever weight the Administrative Law Judge accorded this fact in reaching his conclusion would appear misplaced.

Another significant financial aspect of the transaction is reflected in article 21 of the agreement, relating to Holmes' "Draw on Anticipated Profits." This provision requires Big Bear to pay Holmes $425 each week, irrespective of whether or not the business is showing a profit. Moreover, the amount may be changed only upon the written request of Holmes and with Big Bear's approval, and may not be reduced either quarterly or at the close of the fiscal year for lack of a profit. This amount, roughly comparable to the $18,500 to $23,000 annual salaries received by managers of Respondent's Big Bear markets, is also to be debited to Holmes' interest-free open account. Although the agreement refers to this payment as a "Draw on Anticipated Profits," the payment is totally unrestricted under the contract terms by any necessity of over having any profits to draw on.[13] It would

[13] The 1977 Southland agreement, in comparison, likewise provides for an owner's draw on anticipated profits, but reduces that draw if the draw plus the payroll for the store exceeds a stated percentage of net sales.

appear, rather, to operate as an open-ended salary guarantee with Big Bear again advancing these funds interest free.

Big Bear, as stated, avers that it entered into the franchising agreement in order to cut its financial losses at the La Mesa store.[14] The agreement does not, however, as described above, function to relieve Big Bear of an unprofitable operation. Richard Holmes paid Big Bear only $2,000 and his unsecured promissory note, the principal of which is essentially to be amortized from future profits, if any, of the store, for the Big Bear franchise. As a result of this transaction, Big Bear gained only $2,000 and a promise from Richard Holmes to pay for the other $114,400.81 worth of inventory provided him at some time in the future when the store makes money. Although the agreement requires Holmes to share in any losses of the store, if his open account reflects a balance due upon the termination of the agreement, the record contains no evidence that Holmes owns assets accessible for such purpose. It does indicate, however, that he has pledged no other assets as security. Meanwhile, under the agreement Big Bear is committed to continue its general financing of the store's operation, by virtue of various provisions requiring it to pay all the bills, and by the fact that Holmes pays

[14] While Respondent's other asserted reasons for the franchising of the store, i.e., the desire to maintain its overall market share of the grocery business in San Diego County and to keep Big Bear in the shopping center as a customer-drawing factor, may explain why Respondent did not want to sell the store, they would appear to bear no logical relationship to how franchising could resolve this store's financial difficulties.

no interest on these moneys advanced. Thus, any true entrepreneurial risk would appear to be borne in the first instance by Big Bear, rather than by Holmes.

Furthermore, franchising could not solve the major reason adduced by Respondent for the store's poor financial record. Big Bear President John Mabee testified that the store's volume had been "headed on a straight line up, and all of a sudden with the taking of the parking lot it leveled off and flattened—dropped and has sort of maintained a level line since that particular time," referring to the 1974 state condemnation and 1975—76 freeway construction at the store's locale which resulted in about a 25-percent drop in its sales volume. Franchising could hardly remedy a lack of parking space. Nor does the record contain any evidence that Holmes overcame this problem.

What was accomplished through the purported franchising, however, was a drastic reduction in the store's operating costs through avoidance of the application of Respondent's union contracts to the franchised store's employees. Thus, an examination of profit and loss statements for the store shows, for example, that whereas salaries and wages cost Big Bear $174,204, and employee benefits an additional $24,537 for the period from August 1, 1975, to July 31, 1976, Holmes has operated the franchised store from November 15, 1976, to July 31, 1977, at a salary and wage cost of $81,687, with employee benefits cost-

ing only $1,988. While these figures do not, of course, represent equivalent time periods, they are indicative of drastically reduced costs in this area, with approximately the same number of employees working at the store during both time periods.[15] Operating the store in essentially the same manner as it had previously functioned under Big Bear. Holmes has succeeded through these operating cost reductions in transforming the store from a losing operation to one which earned a net operating income in excess of $30,000 for the first 8½ months of its fiscal year, as reflected in the instant record.

We agree with the General Counsel that the foregoing shows that Respondent's real purpose behind the entire arrangement was to retain for itself control of the La Mesa operation while, through the appearance of a bona fide franchise agreement, achieving a reduction in labor costs through the avoidance of the economic obligations imposed by its collective-bargaining agreements with Local 1222 and Local 229. Further evidence that Big Bear's real objective was simply to oust the Unions from its La Mesa store is, as the General Counsel argues, found in the manner in which it rid that store of those employees which had been represented by the Unions. Thus, those employees were given no option to continue at La Mesa but were, without any consideration apparently being

[15] The parties have stipulated that prior to November 15, 1976, there were 12 employees at the store, and that the number of employees of Holmes at the store after that date was 13. At the time of the hearing, Holmes testified, the store had 16 employees.

given to their choice in the matter, transferred to other Big Bear stores. This was done with respect to employees represented by Local 1222 despite that Union's contract with Big Bear requiring, as noted above, that in the event of a store's transfer or sale an employee be given seven days to choose between applying for a job with the new owner or moving to another of Respondent's stores.[16] Such preemptory transferring out ostensibly would obviate the possibility that Holmes would be a successor employer obliged, despite even a bona fide franchising, to recognize and bargain with the Unions.

Therefore, in view of all the foregoing, including, inter alia, the selection of Richard Holmes, a close relative of high management, as the purported franchisee; the controls retained and exercised by Big Bear over the store's operation; and the economic realities of the arrangement reflected in the franchise agreement whereby Holmes initially invested only $2,000 cash and Big Bear finances the store's operation without charging interest to Holmes, we conclude, contrary to the Administrative Law Judge, that the arrangement between Big Bear and Holmes was not a bona fide franchising transaction, but rather that Holmes' position was essentially that of a manager of,[17] and that he was in fact Respondent's alter ego with respect to, the La Mesa store.[18] Accordingly, we find that Richard Holmes and Respondent constitute a single employer within the meaning of Section

[16] See fn. 5, supra.

2(2) of the Act, and that employees of the La Mesa store are employees of Respondent and part of the bargaining units covered by Respondent's collective-bargaining agreements with Local 1222 and Local 229.

Therefore, by withdrawing recognition from and refusing to recognize Local 1222 and Local 229 as the collective-bargaining representatives of the employees in the separate units at the La Mesa store on and after November 15, 1976, and by refusing at such times to apply the terms of the collective-bargaining agreements to such employees, thereby unilaterally changing the terms and the conditions of employment specified in the applicable collective-bargaining agreements, Respondent violated Section 8(a)(5) and (1) of the Act. Respondent additionally violated Section 8(a)(5) and (1) of the Act by refusing to furnish information to Local 1222 when that Union requested names and addresses of its bargaining unit employees at the La Mesa store from Respondent's alter ego, Richard Holmes. Finally, by transferring employees at the La Mesa store to other stores because of their representation by Local 1222 and Local 229, Respond-

[17] As noted above Holmes' "guaranteed" minimum income under the "franchising" arrangement was substantially the same as that earned by managers of Respondent's other stores.

[18] The record indicates that control over labor relations with the new La Mesa store employees existed essentially in Richard Holmes. While we have regarded the control which one party exercises over the labor relations policy of another to be an important factor in deciding whether a franchisee is an independent contractor or a single or joint employer with its franchisor, our application of that criterion has been premised upon the existence of a bona fide, arm's length franchising relationship between the contracting parties. See The Southland Corporation, d/b/a Speedee 7-Eleven, supra. Here, based upon a consideration of all the factors present in this case, we cannot, as concluded above, find that Richard Holmes and Big Bear entered into such a bona fide, arm's length franchising relationship.

ent violated Section 8(a)(3) and (1) of the Act as well.[19] * * *

Local 1222 has asserted that the transfer of the La Mesa store employees to other stores within the multistore bargaining unit resulted in layoffs and reductions in hours of unit employees at these other stores. The Administrative Law Judge, while noting this general assertion, found insufficient record evidence to support such a finding. Inasmuch as we have found Respondent's transfer of union-represented employees from the La Mesa store to be unlawful, any unit employees at other Big Bear stores of Respondent within the bargaining units represented by either Local 1222 or Local 229 who in fact suffered losses as a result of Respondent's unlawful conduct are entitled to be made whole for such losses. Whether or not such losses occurred, or their extent, is a matter which can properly be resolved at the compliance stage of this proceeding. We shall, however, include in our Order herein a provision requiring that the Notice to Employees be posted at all Big Bear stores of Respondent in the bargaining units, in order that any unit employees who may have suffered losses as a result of Respondent's unlawful employee transfers may thereby be apprised of their right to be made whole.

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[19] Inasmuch as we have found that Big Bear Supermarkets No. 3 and Richard Holmes are a single employer, and Respondent's union contracts provide for employee transfers between stores within the multistore bargaining units without prior consultation with the Unions, we do not find the transfers violated Sec. 8(a)(5) of the Act.

APPENDIX A

The Remedy

Having found that Respondent has engaged in, and is engaginging in, unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, we shall order Repsondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As we have found that Respondent unlawfully withdrew recognition from and refused to recognize and bargain with Local 1222 and Local 229 as the exclusive representatives of the La Mesa store employees in their respective bargaining units, we shall order Respondent to recognize and bargain with the Unions as the representatives of Respondent's employees in those units at the La Mesa store. Having also found that Respondent unlawfully refused to apply the collective-bargaining agreements with these Unions to the unit employees at the La Mesa store, thereby unlawfully changing the terms and conditions of employment specified in the collective bargaining agreements, we shall also order Respondent to restore the *status quo ante* by applying the terms and conditions of the current collective-bargaining agreements with these Unions to the La Mesa store employees, retroactive to November 15, 1976, and to make the La Mesa store employees whole for any losses suffered as a result of Respondent's failure to apply the collective-bargaining agreements to them, with interest to be

computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB No. 117 (1977).[22]

We shall also order Respondent to supply Local 1222 with the names and addresses of its La Mesa store bargaining unit employees, as requested by that Union, as well. Furthermore, as we have found that Respondent discriminatorily transferred La Mesa store employees to other stores within the multistore bargaining units because of their union representation, we shall order Respondent to offer the employees who were transferred out of the La Mesa store immediate reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, displacing if necessary any employees assigned to these positions since November 15, 1976, without prejudice to their seniority or other rights and privileges, and to make whole the transferred employees or any other unit employees[23] for any losses they may have suffered as a result of the unlawful transfers. All such losses are to be reimbursed in the manner set forth in *F. W.*

[22] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1952).

[23] Local 1222 has asserted that the tranfer of the La Mesa store employees to other stores within the multistore bargaining unit resulted to layoffs and reductions in hours of unit employees at these other stores. The Administrative Law Judge, while noting this general assertion, found insufficient record evidence to support such a finding. Inasmuch as we have found Respondent's transfer of union-represented employees from the La Mesa store to be unlawful, any unit employees at other Big Bear stores of Respondent within the bargaining units represented by either Local 1222 or Local 229 who in fact suffered losses as a result of Respondent's unlawful conduct are entitled to be made whole for such losses. Whether or not such losses occurred, or their extent, is a matter which can properly be resolved at the compliance stage of this proceeding. We shall, however, include in our Order herein a provision requiring that the Notice to Employees be posted at all Big Bear stores of Respondent in the bargaining units, in order that any unit employees who may have suffered losses as a result of Respondent's unlawful employee transfers may thereby be apprised of their rights to be made whole.

Woolworth Company, 90 NLRB 289 (1950), with interest thereon to be computed as prescribed in *Florida Steel Corporation, supra.*

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

BRANCH OFFICE

SAN FRANCISCO, CALIFORNIA

BIG BEAR SUPERMARKETS NO. 3 and RETAIL CLERKS UNION, LOCAL 1222, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO	Case 21-CA-15605
BIG BEAR SUPERMARKETS NO. 3 and AMALGAMATED MEAT CUTTERS LOCAL 229, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO	Case 21-CA-15703

Judith A. Williams of Los Angeles, Calif., for the General Counsel.

Douglas R. Olins of *Olins & Forester* of San Diego, Calif., for the Charging Party Retail Clerks.

Richard D. Prochazka of *Domnitz and Prochazka* of San Diego, Calif., for the Charging Party Meat Cutters.

Raymond T. Theep of San Diego, Calif., for the Respondent.

Edwin C. Schreiber of *Keltner & Schreiber* of Beverly Hills, Calif., for the Intervenor.

DECISION

Statement of the Cases

ROGER B. HOLMES, Administrative Law Judge: The unfair labor practice charge in Case 21-CA-15605 was filed on April 4, 1977, by Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, herein called the Charging Party Retail Clerks. The Regional Director of Region 21 of the National Labor Relations Board, herein called the Board, acting on behalf of the General Counsel of the Board, issued on May 25, 1977, a Complaint and Notice of Hearing in Case 21-CA-15605 against Big Bear Supermarkets No. 3, herein called the Respondent.

Thereafter, the Respondent and Richard Holmes, who was contended to be operating the La Mesa, California, store as the *alter ego* of the Respondent, each filed separate answers to the complaint.

The unfair labor practice charge in Case 21-CA-15703 was filed on May 9, 1977, by Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, herein called the Charging Party Meat Cutters.

The Regional Director of Region 21 of the Board, on behalf of the General Counsel, issued on June 9, 1977, an Order Consolidating Cases, Consolidated Amended Complaint, and Amended Notice of Hear-

ing in Cases 21-CA-15605 and 21-CA-15703. The General Counsel's consolidated complaint alleges that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, herein called the Act. The Respondent and Richard Holmes once again filed separate answers in which each one denied the commission of the alleged unfair labor practices, and each one raised certain affirmative defenses.

The trial was held before me on September 8, 1977, at San Diego, California. The consolidated complaint alleges only Big Bear Supermarkets No. 3 as the Respondent—which pleading is consistent with the contention advanced by the General Counsel and both Charging Parties that Richard Holmes is, in fact, the *alter ego* of Big Bear Supermarkets No. 3 in his operation of the La Mesa store. It is not contended, for example, that Richard Holmes is the successor employer to Big Bear Supermarkets No. 3 at the La Mesa store. Instead, the legal theory, on which the consolidated complaint is predicated, is straightforward and clear that this case is being tried on an *alter ego* theory.

At the trial, Richard Holmes was permitted to intervene and to participate fully in these proceedings. As indicated in the answers previously filed by Richard Holmes and the Respondent, it is their contention

that Richard Holmes is not the *alter ego* of Big Bear Supermarkets No. 3.

As stated at the outset of the trial (Transcript page 7), and reiterated here for those persons who were not present at the trial, I am not related to the Intervenor, Richard Holmes. It is a mere coincidence of having the same last name.

Counsel for the General Counsel, the attorney for the Charging Party Retail Clerks, the attorney for the Charging Party Meat Cutters, the attorney for the Respondent, and the attorney for the Intervenor each filed very persuasive briefs by the due date of November 14, 1977. Those briefs have been read and considered.

On December 6, 1977, Counsel for the General Counsel filed with me a Motion to Strike Portions of Respondent's Brief. The portions sought to be stricken include Appendix 3 attached to the brief and certain parts of the argument in the brief which pertain to that multi-paged document. Appendix 3 purports to be cerain marketing information compiled by the advertising department of the *San Diego Union* and *The Evening Tribune* newspapers. Counsel for the General Counsel correctly points out that the document was not introduced in evidence at the trial.

On December 13, 1977, the attorney for the Respondent filed a Response to Motion to Strike Portions of Respondent's Brief in which it was urged,

inter alia, that the materials contained in Appendix 3 were matters which were subject to judicial notice pursuant to Rule 201(b) of the Federal Rules of Evidence, and further that judicial notice may be taken at any stage of the proceeding in accordance with Rule 201(f) of the Federal Rules of Evidence.

I have reviewed Rule 201 and the legislative history pertaining to that particular rule. (See the compilation prepared at the request of the Federal Judicial Center, *Federal Rules of Evidence for United States Courts and Magistrates, Approved January 2, 1975, Effective July 1, 1975, with Notes by the Federal Judicial Center, Pertinent Advisory Committee Notes and Relevant Legislative History*, West Publishing Co. (1975).)

I am not persuaded that the marketing survey results meet the standards set forth in section (b) of Rule 201 ". . . either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." As to the first criteria, it seems to me that the marketing information would not be a matter "generally known" in the greater San Digeo area, but instead, that it would be a matter of special knowledge to advertisers in the grocery business and to the publishers of the two daily newspapers which prepared the survey. As to the second criteria, it has not been shown that the accuracy of the information

can be readily determined by resort to sources whose accuracy cannot be reasonably questioned.

I note that the Board has taken judicial notice of certain regulations of the City of Chicago, but declined to take judicial notice of certain other matters requested by the charging party in *Yellow Cab Company*, 229 NLRB No. 190 (1977). At footnote 2 in that decision, the Board stated: ,

> The Charging Party has requested the Board to take judicial notice of (1) certain new city of Chicago regulations affecting the taxicab industry which were promulgated after the close of the hearing in this case, (2) certain facts which are on record with the office of the Chicago Commissioner of Sales, Weights and Measures, and (3) a bulletin issued by Respondent Checker and a newspaper advertisement which announce a program of free hospitalization insurance to be furnished by Checker to its lessee drivers. We hereby take judicial notice of the newly promulgated city of Chicago regulations, as these are properly within the province of judicial notice. We decline, however, to take judicial notice of the other requested items, as these are not matters which can properly be judicially noticed.

After considering the foregoing, I have decided that Counsel for the General Counsel is entitled to have her motion to strike granted in these circumstances. Accordingly, the motion to strike by the General Counsel is hereby granted.

Findings of Fact

Upon the entire record in this proceeding and based upon my observation of the demeanor of the witnesses, I make the following findings of fact.

I. Jurisdiction

The Respondent has been at all times material herein a corporation engaged in the operation of retail grocery markets in San Diego County, California. At least until on or about November 15, 1976, the Respondent owned, operated and managed a retail grocery and meat market at 8745 Broadway in La Mesa, California.

In the normal course and conduct of its business operations, the Respondent has annually derived gross revenue in excess of $500,000, and the Respondent has annually purchased and received goods, materials and supplies valued in excess of $50,000 directly from suppliers located outside the State of California.

Upon the foregoing facts admitted in the pleadings and upon the entire record in this proceeding, I find that the Respondent has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

It was admitted in the pleadings that both Charging Party Retail Clerks and Charging Party Meat

Cutters have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act. Accordingly, I find those facts to be so.

III. The Alleged Unfair Labor Practices

A. The Issues

The principal issue raised by the pleadings is whether Richard Holmes, the Intervenor, is the *alter ego* of Big Bear Supermarkets No. 3, the Respondent, in the operation of the La Mesa store.

If a preponderance of the evidence establishes that fact, then the issues are whether the Respondent violated Section 8(a)(1), (3) and (5) of the Act: (1) by refusing since on or about November 15, 1976, to bargain with Charging Party Retail Clerks and Charging Party Meat Cutters as the collective-bargaining representatives of separate units of Respondent's employees at the La Mesa store; (2) by refusing to honor and abide by the terms of the collective-bargaining agreements between the Respondent and those two Unions with respect to the units of employees at the La Mesa store; (3) by withdrawing recognition from those two Unions as the collective-bargaining representatives of the employees in the separate units at the La Mesa store; (4) by unilaterally transferring the employees at the La Mesa store to other stores of the Respondent within the multi-store bargaining units; and (5) by refusing since December 1976 to furnish to Charging Party

Retail Clerks certain information requested by that Union, to wit: the names and addresses of employees at the La Mesa store who were working in the bargaining unit represented by the Charging Party Retail Clerks.

B. The Witnesses

In alphabetical order, the following persons appeared as witnesses at the trial in this proceeding:

Samuel F. Daly is a Business Agent for the Charging Party Retail Clerks.

Gerald C. Holmes has been Secretary-Treasurer of the Respondent for the past 20 years. He is one of the members of the Board of Directors of the Respondent, and he holds approximately 5 percent of the shares of stock in the Respondent. No other member of his family owns stock in the Respondent.

Richard Holmes is the Intervenor in these proceedings and the person alleged to be operating the La Mesa store as the *alter ego* of the Respondent. At the time of the trial, he was 31 years old. He worked for the Respondent during the years 1969 through 1976. He was employed as a clerk, an assistant manager, and as a manager for the last 4 or 5 years of his employment. First, he was the manager of Respondent's store Number 6, and then he became manager of the Respondent's El Cajon store for 2 years. His father is Gerald Holmes.

Marc Lemieux is a Business Agent of the Charging Party Retail Clerks.

John C. Mabee is President of the Respondent. He owns approximately 80 percent of the shares of stock in the corporation, and he is one of the members of the Board of Directors. Except for the years 1948-1949, he has been in the grocery business since 1944.

Chris Platten has been Administrative Assistant to the President of the Charging Party Retail Clerks since January 1977. Previously, Platten had served as a Business Agent of that union since November 1, 1975. Prior to that time, he worked as an employee of the Respondent from September 1972 to November 1975. During that period of time, Platten primarily worked at the Respondent's San Carlos store, but he also worked at the Respondent's El Cajon, Claremont, and Adams Avenue stores. In addition, he worked at the Respondent's Jonathan's store in La Jolla, California.

Albert Stegman has been a Business Agent for the Charging Party Meat Cutters for almost 3 years at the time of the trial.

Raymond T. Theep is the attorney for the Respondent. He testified with regard to his preparation of the agreement between the Respondent and the Intervenor.

Tom Vandeveld has been president of the Charging Party Retail Clerks since November 1975.

The findings of fact in this section have been based upon the testimony of each one of the witnesses.

C. Credibility Resolutions

A significant number of the material facts in this proceeding are not in dispute.

The attorneys for the parties are to be commended for taking the time and exerting the extra effort to arrive at numerous stipulations of fact concerning many different matters which were not seriously contested. Many of the findings of fact to be made herein will be based upon such stipulations by the parties, and also many findings will rest upon the substantial amount of documentary evidence which was introduced at the trial.

Although stipulations and documentary evidence provide the basis for making numerous findings of fact, I will also rely extensively upon the testimony given by Mabee and by Richard Holmes throughout the decision. Whether they were on direct examination or cross-examination, it seemed to me that they were responding to the questions truthfully and without regard as to whether their answers supported or detracted from their legal positions. In particular, Mabee demonstrated that he was a very knowledgeable witness concerning many matters, and that he

was a responsible witness who was not evasive in his answers, nor one who attempted to conceal the facts. Richard Holmes gave the impression of being a sincere witness who was honestly relating the facts.

As in most trials, there were some conflicts among the witnesses in relating past events. In Section H herein, I will rely upon the testimony of Mabee and Gerald Holmes concerning the question of whether there were layoffs and reductions in hours as a result of the transfer of the employees from the La Mesa store. Their testimony on this point is consistent, and in view of Mabee's knowledge of his business, I find his testimony more persuasive than the general assertion that layoffs and reductions took place.

In Section I herein, I will primarily rely upon the detailed testimony of Richard Holmes on this subject, along with the testimony of Mabee and a stipulation of the parties. However, to the extent that their testimony is not inconsistent with the foregoing, I shall also rely upon the testimony given by Stegman, Vandeveld, Platten, Daly, and Lemieux.

In Section J herein, I will also rely upon the testimony of Richard Holmes. Although I did not have the opportunity to observe Fougeron testify, his stipulated version is not substantially different on any material matter, and, as indicated above, I find Richard Holmes to be a credible witness. In these circum-

stances, I will base the findings of fact on the testimony of Richard Holmes.

In Section K herein, the versions given by Richard Holmes and Gerald Holmes are consistent. Of course, Gerald Holmes was not present at the entire conversation, but to the extent that he was present, his version supports the version given by Richard Holmes.

With regard to each section, the source or basis for the findings of fact in that particular section will be stated at the end of each section.

D. The Collective Bargaining History

The parties entered into the following stipulations on this subject matter:

> (a) Since at least 1957, and continuing to date, Respondent has been party to successive collective-bargaining agreements, the most recent of which is effective from July 28, 1975, to July 30, 1978, with Retail Clerks Local 1222 as the exclusive representative for purposes of collective bargaining of Respondent's employees in a unit of all hourly employees working in the job classifications enumerated in the aforestated current collective-bargaining agreement at its retail grocery and meat markets in San Diego County, which unit constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(b) Prior to November 15, 1976, this unit described in paragraph (a) above included employees of Respondent's store No. 13 located in La Mesa, California.

(c) Since at least 1957, and at all times material herein, Local 1222 has been the representative for the purposes of collective bargaining of a majority of the employees in the unit described in paragraph (a) above, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(d) Since at least 1950, and continuing to date, Respondent has been party to successive collective-bargaining agreements, the most recent of which is effective from November 8, 1976, to November 4, 1979, with Amalgamated Meat Cutters Local 229 as the exclusive representative for purposes of collective bargaining of Respondent's employees in a unit of all hourly employees working in the job classifications enumerated in the aforestated current collective-bargaining agreement at its retail grocery and meat markets in San Diego County, which unit constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(e) Prior to November 15, 1976, the unit described in paragraph (d) above included em-

ployees of Respondent's store No. 13 located in La Mesa, California.

(f) Since at least 1950, and at all times material herein, Local 229 has been the representative for the purposes of collective bargaining of a majority of the employees in the unit described in paragraph (d) above, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The parties further stipulated that:

On August 27, 1976, Mr. Max Osslo, Secretary-Business Manager for Amalgamated Meat Cutters Local No. 229, ("Local 229," herein) notified Employer, in writing, that the Union desired to terminate the Collective Bargaining Agreement between the Employer and Local 229 as of its expiration date (November 7, 1976).

That, on or about, March 11, 1977 Employer entered into a successor Collective Bargaining Agreement with Local 229, which provided for, among other things, retroactivity of all wage and fringe benefit increases to November 8, 1976.

The documents which comprise the collective-bargaining agreements in effect at all times material

herein between the Charging Party Retail Clerks and the Respondent were introduced into evidence as Genral Counsel's Exhibit 7. The documents which comprise the collective-bargaining agreements in effect at all times material herein between the Charging Party Meat Cutters and the Respondent were introduced into evidence as General Counsel's Exhibit 8.

The subject of transfers of employees by the Respondent is set forth in Article III, Section H 2(a), (b), and (c) and Section I of General Counsel's Exhibit 7. The subject also is covered in Article XVI, Section D of General Counsel's Exhibit 8. While the agreements between each Charging Party and the Respondent create certain rights for the transferred employee and place some limitations on the Respondent, the agreed-upon provisions pertaining to such transfers do not require that the Respondent give advance notice to the unions. For example, Article III, Section I of the General Counsel's Exhibit 7 provides:

> I. OPERATIONAL TRANSFER.
>
> 1. It is recognized that to meet the necessities of the business and to advance the Employer's equal employment opportunity program, transfer of employees, either within the geographical jurisdiction of a Union party to this Agreement or from the jurisdiction of one such Local Union to another such Local Union may be required. In such cases where such transfer

is effected by the Employer, the transferred employee will carry to such employee's new assignment all seniority, as defined above, acquired in the employ of the Company. This transfer rule shall have application to both the available and self-restricted seniority lists. Transfers referred to in this Paragraph shall not require an employee to travel one way more than twenty-five (25) miles between the employee's residence and the new location. Reasonable tolerance of these limits shall be allowed for temporary transfers such as vacation relief and store openings.

2. These transfer provisions shall not be applied in an arbitrary, capricious, or discriminatory manner or for disciplinary purposes, and shall not be utilized as a device for creating hardship to the employee in order to force or provoke resignation.

Article XVI, Section D in General Counsel's Exhibit 8 provides:

D. An employee covered by this Agreement shall have the right to refuse a transfer to another location if the distance to travel one (1) way is more than thirty (30) miles between his place of residence and the new location. A refusal of a transfer by an employee covered by this Agreement under any of these circumstances shall not constitute a reason for discrimination, layoff or discharge, except in the case of layoffs due to lack of work.

The findings of fact set forth in this section have been based upon stipulations by the parties and documentary evidence.

E. The Decision to Enter Into a Franchise Agreement for Operation of the La Mesa Store

At the time of the trial, the Respondent operated 21 or 22 Big Bear grocery supermarkets; 2 Jonathan's grocery stores in La Jolla and Rancho Santa Fe, California; 5 Cook's Markets in the Imperial Valley; 1 Marketplace; 9 Daisy Restaurants, and 15 Par Liquor Stores. Additionally, John Mabee's business interests included the operation of about 14 shopping centers with a couple of hundred tenants, and a construction business.

There were between 1200 and 1300 persons employed by the Respondent at the time of the trial.

Approximately 80 percent of the shares of stock in the corporation were owned by Mabee. Gerald Holmes held about 5 percent of the shares of stock. About 15 percent of the shares were held by supervisors of the Respondent and 1 to 3 outside stockholders. Mabee, Ms. Mabee, and Gerald Holmes were identified as being members of the Board of Directors.

Several factors entered into the decision to franchise the operation of the La Mesa store. Among these factors were the financial problems encountered by the Respondent at the La Mesa store in the 2 fiscal

years preceding the decision to franchise the store; the fact that the Respondent had closed some other stores and was reluctant to give up more of its market share, and the fact that Mabee himself owned the shopping center in which the La Mesa store was located.

The size of the La Mesa store was significantly smaller than the average size of other supermarkets operated by the Respondent. Mabee said the La Mesa store had 14,800 square feet of space, whereas the average size of a new supermarket would range from 27,000 square feet to 50,000 square feet of space.

The State of California took a considerable amount of the parking area available to customers at the shopping center in condemnation proceedings for a freeway. When Mabee originally purchased the land in 1950, there were 13 acres, but now there are less than 2 acres in the shopping center. One of the condemnations was in 1962, and another one was filed in 1974 with construction being completed in 1975-1976.

The impact of the loss of parking space and the continuing problem of not having good access into the center were reasons which Mabee cited as being factors in the loss of 25 percent of the sales volume at the La Mesa store. The most recent condemnation resulted in the closing of two other businesses at the center: a Fotomat store and Der Wienerschnitzel.

Profit and loss statements for the La Mesa store revealed the following:

August 1, 1973 to July 31, 1974	$ 1,580.00	profit
August 1, 1974 to July 31, 1975	$52,507.00	loss
August 1, 1975 to July 31, 1976	$55,320.00	loss

Since there were 12 to 13 other tenants in the shopping center, Mabee believed that the loss of the Big Bear name would adversely affect the other tenants. In his opinion, the other tenants of the shopping center were relying upon the Big Bear store to draw customers into the center. Since Mabee owned the shopping center, this was another reason for deciding to franchise the operation and retain the Big Bear name in his center.

Mabee further explained that he was reluctant to relinquish any more of the Respondent's market share since the Respondent had no other grocery store in that particular area. He stated that the Respondent had approximately 11 percent to 13 percent of the share of the grocery market in San Diego County.

Two other unprofitable stores had been sold previously by the Respondent in 1975. Unlike the La Mesa store, both stores were on leased premises, rather than in shopping centers owned by Mabee. One store was located at Menlo and El Cajon Boulevard, and the other was located in Del Mar. The Del Mar store was only about 11,000 square feet in size, and the Respondent built a new store about a mile

and a half away. The old store was remodeled as a Jonathan's store, but was not successful and was sold about 4 to 6 months later.

In addition, two Marketplace stores of the Respondent were closed and then two other Marketplaces were sold. Mabee described them as small units of only 5,000 to 8,000 square feet. The Marketplace stores were non-union.

The findings of fact in this section are based upon the testimony given by Mabee and upon documentary evidence.

F. The Events and Discussion Pertaining to the Franchise Agreement

Because of their knowledge of the business, Mabee felt that the manager at the Respondent's stores would be the most qualified persons to handle the franchise of the La Mesa store. Mabee said that the annual salary of a store manager of the Respondent varied from $18,500 to $23,000. He expressed the opinion at the trial that an "outsider" would need an exceptional amount of training for that task, and that such a person would be an "unknown quantity."

In giving consideration to the store managers employed by the Respondent, Mabee narrowed the choice down to two possibilities for the franchise operation. One was Richard Holmes, who was the son of Gerald Holmes and a manager of a high vol-

ume store of the Respondent, and the other was the store manager at the La Mesa store. Although the La Mesa store manager had about 15 years of experience with another independent grocer, he had only been employed by the Respondent for about 1 year at that point in time. Knowing that Richard Holmes was then the manager of a high volume store and knowing that he had multiple sclerosis, Mabee decided to make the offer to Richard Holmes.

Mabee said that the whole transaction was discussed in advance with the Board of Directors of the Respondent and with the supervisors who also owned shares of stock in the corporation. That was done prior to his meetings and discussions with Richard Holmes.

In October 1976 Mabee met with Richard Holmes and Gerald Holmes at which time the idea of Respondent's franchising the La Mesa store was discussed. There were subsequently three or four additional meetings just between Mabee and Richard Holmes.

As noted earlier, Richard Holmes had been the manager of Respondent's El Cajon store for about 2 years. Richard Holmes described the El Cajon store as being approximately 20,000 square feet in size and as having an annual volume of business about $5 million to $6 million.

In August 1975, Richard Holmes had been advised that he had multiple sclerosis. The symptoms became more severe and began affecting his job performance as manager of the Respondent's El Cajon store, and ultimately, resulted in his having to take a leave of absence from work. The Veterans Administration has rated his disability as being 30 percent.

During discussions between Mabee and Richard Holmes. it was agreed that the profits would be divided on a 60-40 basis, with Richard Holmes receiving the 60 percent. Mabee was certain that he did not discuss with Richard Holmes that he would not be bound by the Union's contracts; however, after Richard Holmes made the decision to operate on a non-union basis, he so informed Mabee. At that point, Mabee started making plans for the transfer of the employees.

After reviewing the profit and loss statement for the La Mesa store, and prior to his signing the franchise agreement with the Respondent, Richard Holmes said that he may have mentioned to Mabee that Richard Holmes had made the decision to operate the store on a non-union basis. Richard Holmes stated at the trial that he knew that the La Mesa store had been a losing operation at the time he accepted the franchise.

About the first of November 1976, Theep was asked by Mabee to prepare a draft of an agreement

between the Respondent and the Intervenor. Theep recalled that at that point in time Mabee gave him a list of items which had been agreed upon between Mabee and Richard Holmes. He stated that Mabee gave him no instructions regarding labor relations matters.

Utilizing a 1966 copy of a Southland Corporation franchise agreement for a 7-Eleven store, Theep prepared a draft of an agreement. He said that he tailored the language from that copy, and he made what he viewed to be "major changes" concerning the provisions relating to: (1) rent; (2) advertising; (3) termination of the agreement; and (4) inventory. Theep said that he prepared three drafts of the agreement before it was signed on November 8, 1976.

The parties stipulated that a physical inventory of the La Mesa store was taken on November 14, 1976. On November 15, 1976, the escrow closed, and Richard Holmes began operating the La Mesa store under business licenses in his name. Other than its normal hours of closure, the La Mesa store was not closed as a result of this transaction.

The beginning inventory at the La Mesa store as of November 15, 1976, was valued at $116,400.81.

The reasons for the agreement on the $2,000 initial cash payment by Richard Holmes to the Respondent were summarized by Mabee as follows: (1) Mabee had known Richard Holmes and his back-

ground for 20 years; (2) Mabee knew that Richard Holmes was a financially responsible person and a stable individual with assets; and (3) Mabee believed that ". . . it would work itself out in a fairly rapid fashion for the dollar amounts involved."

Richard Holmes said that he was his own sole support, and he estimated his personal net worth as being in excess of $100,000. He pointed out at the trial that if the La Mesa store did not make a profit, then he would have to bear the loss. On the other hand, if the La Mesa store shows a profit, then Richard Holmes would receive his share of the profits. He pointed out that he would pay income tax on his part of the profits.

He contrasted his present situation with that of a store manager in one of the Respondent's stores. If the store made a profit, then the store manager would probably receive a bonus. However, there was no bonus for the store manager if the store did not make a profit. If the store's operation resulted in a loss, the store manager, however, did not personally bear any portion of the store's operating loss.

The original amount of the promissory note between the Respondent and Richard Holmes was $116,400.81. As noted above, his initial cash payment was $2,000. In addition to the payments for interest, Richard Holmes has made payments on the principal since that time in excess of $18,000. He stated at

the trial that he had decided to apply his total net profits to payments on the principal amount, so that he could make the payments sooner than was required. His record of payments was introduced as Intervenor's Exhibit 1, which provides in pertinent part:

date of payment	date due	amount due	credited on int.	credited on prin.	bal. of prin. unpaid
					116,400.81
11-20-76	Deposit	2000		2000.00	114,400.81
12-15-76		500	476.67	23.33	114,377.48
1-15-77		500.00	476.57	23.43	114,354.05
1-13-77		7031.00		7031.00	107,323.05
2-15-77		500	447.18	52.82	107,270.23
3-15-77		500	446.96	53.04	107,217.14
4-15-77		500	446.74	53.26	107,163.93
4-20-77		6876		6876.00	100,287.93
5-15-77		500.00	417.87	82.13	100,205.80
6-15-77		500.00	417.52	82.48	100,123.32
7-15-77		500	417.18	82.82	100,040.50
7-31-77		2128.50		2128.50	97,912.00

Thus, the balance due by Richard Holmes as of July 31, 1977, was $97,912.00.

The findings of fact in this section are based upon the testimony of Mabee, Theep and Richard Holmes, as well as upon documentary evidence and a stipulation of the parties.

G. The Franchise Agreement

The agreement between the Respondent and Richard Holmes is set forth in General Counsel's Exhibit 3. The agreement itself is 12 pages long and is typed

double-spaced on legal size paper. There is a 13th page for signatures. In addition, there are several attachments to the agreement.

Rather than set forth herein the entire agreement, I have selected certain items from the agreement to be reproduced here with just the headings of the remaining items. Of course, the entire agreement has been read and considered. By setting forth certain portions of the agreement, it does not mean that the remainder has been ignored. The entire document is in evidence and anyone desiring to consult the other parts simply may examine General Counsel's Exhibit 3.

The preamble to the agreement provides:

> THIS AGREEMENT is made and entered into this ..... day of November, 1976 by and between RICHARD A. HOLMES, a married man hereinafter referred to as OWNER and BIG BEAR SUPER MARKET No. 3, a California corporation, 5075 Federal Boulevard, San Diego, California 92102, hereinafter referred to as BIG BEAR.
>
> BIG BEAR owns equipment and leases real property and improvements commonly known as Store No. 13 at 8745 Broadway, La Mesa, California 92041, suitable for use as a general retail grocery and related sundries business.
>
> OWNER desires to lease said real property and the improvements thereon, described in Exhibit

A initialed by the parties and attached hereto, and the equipment installed therein, described in Exhibit B, initialed by the parties and attached hereto; and to secure a franchise agreement to use the tradename, trademark, labels and copyrights applicable to the BIG BEAR name and the services of BIG BEAR in connection with the operation of said business.

Thereafter, the subject headings and portions of the agreement are as follows:

1. DESCRIPTION AND TERM.

* * *

2. MASTER LEASE.

* * *

3. USE.

* * *

4. ASSIGNMENT.

* * *

5. MAINTENANCE AND REPAIR.

* * *

6. RENT FOR BUILDING AND FIXTURES.

a. It is hereby agreed that BIG BEAR shall be entitled to receive the sum of one and one-

half percent (1½%) of OWNER'S monthly Net Sales or the sum of Two Thousand Two Hundred Dollars ($2,200.00) whichever is greater, as monthly rent for the premises leased hereunder.

b. It is hereby agreed that BIG BEAR shall be entitled to receive the sum of 0.15% of OWNER'S Monthly Net Sales or the sum of Two Hundred Twenty Dollars ($220.00) whichever is greater as monthly rent for the equipment leased hereunder.

c. It is further agreed that BIG BEAR shall be entitled to debit OWNER'S Open Account for said rentals.

7. FRANCISE AND LICENSE. BIG BEAR hereby grants to OWNER the right and license to use, at the above described location, the BIG BEAR system and the tradename, trademark, labels and copyright applicable to said system.

8. TERM. The term of this Agreement shall coincide with the term of the real property and equipment leases hereinabove provided and the termination of one shall simultaneously terminate the other.

9. PERMITS AND LICENSES. OWNER covenants and agrees to comply with valid ordinances, regulations and laws of any municipal and governmental authority applicable to OWNER'S use of the demised premises at OWNER'S expense. OWNER shall obtain when required

a Business License, Sales Tax Permit, State Employment Number, Health Permit, State and Federal Beer and Wine Licenses, if available, and any and all other licenses or permits required by governmental authorities. All matters concerning licenses relating to alcoholic beverages shall be processed through the Department of Alcoholic Beverage Control.

BIG BEAR agrees to advance to OWNER sufficient sums to obtain said permits, which sums shall be debited to OWNER'S Open Account.

10. INVENTORY. OWNER'S description is not limited in purchasing products for inventory. BIG BEAR will supply OWNER with "house label" products and wholesaling services at customary wholesale rates. OWNER does agree to stock and to sell advertised goods at the advertised prices and to honor discount coupons contained in BIG BEAR advertisements.

However, OWNER does acknowledge and agree that BIG BEAR has developed a unique and valuable system for the operation of supermarkets in San Diego County, California and OWNER specifically obligates himself to carry such product lines as are customarily carried in the BIG BEAR system, and in such quantities as are reasonably necessary, in the sole judgment of BIG BEAR, to meet customer demands for such products. Furthermore, OWNER agrees that OWNER will obtain permission from BIG BEAR before OWNER changes any

product line customarily carried in the BIG BEAR system.

11. INSURANCE. BIG BEAR agrees initially to arrange for the following insurance:

a. Such insurance as is required by the Master Lease. If liability insurance is not required under the Master Lease, BIG BEAR shall procure liability insurance in limits of not less than $100,000.00 for death or injury to one person, $300,000.00 for death or injury to more than one person and $25,000.00 for property damage.

b. Fire and comprehensive coverage insurance (including fire, hail, windstorm, hurricane, tornado, vandalism, malicious destruction and theft) on the equipment leased hereunder.

c. Fire and comprehensive coverage insurance (as above) on OWNER'S inventory of stock in trade.

OWNER'S Open Account will be debited for the cost of any such insurance obtained.

If, in the opinion of BIG BEAR, the improvements on the demised premises are rendered substantially unfit for occupancy by any casualty, BIG BEAR shall have the option to terminate this agreement or to rebuild the demised premises, which option shall be exercised by notice in writing within 10 days of the happening of the casualty. Should BIG BEAR

notify OWNER that it has elected to rebuild the improvements on the demised premses, this agreement shall entirely abate from the date such notice is given as provided in paragraph 24, and shall remain in abeyance until the day OWNER shall open for business to the public. If, in the opinion of BIG BEAR, the improvements on the demised premises are rendered only partially unfit by any casualty, BIG BEAR shall promptly and diligently restore said improvements and this agreement shall not abate.

12. TAXES. OWNER shall pay, or cause to be paid pursuant to the Master Lease, all real property taxes due on the demised premises and improvements.

OWNER shall pay all personal property taxes on their inventory and OWNER shall pay all applicable personal property taxes on the equipment leased herein.

OWNER shall also pay all sales taxes applicable to sales made from the demised premises.

BIG BEAR shall make the actual payments required o OWNER under this paragraph and shall debit OWNER'S Open Account for the cost thereof.

OWNER shall also make his own provisions for both State and Federal Income Taxes. BIG BEAR will provide technical assistance to OWNER in this matter.

13. ADVERTISING. BIG BEAR shall, at its expense, contract for such advertising in connection with the BIG BEAR system as is deemed sufficient in its sole judgment. Nothing herein shall prevent OWNER from purchasing such suitable advertising as he may desire, at his expense, provided, however, such advertising as may be purchased by OWNER must be approved in writing by BIG BEAR and shall not, in the sole judgment of BIG BEAR be inconsistent with or conflict with the purposes of advertising planned by BIG BEAR. Free merchandise, products and sums of money received from suppliers from advertising or promotional purchased for which OWNER is not charged, and advertising allowances received from suppliers shall be included in the general advertising budget of BIG BEAR.

OWNER shall pay his store's pro rata share of such advertising costs incurred by debiting OWNER'S Open Account based on the ratio that OWNER'S Gross Gain bears to the Gross Gain of all stores in the BIG BEAR system.

14. OWNER'S OPERATION. It is the intention of the parties hereto that OWNER shall be an independent contractor and exercise control over the manner and means of the operation of his business. OWNER and his agents and employees shall under no circumstances be considered or construed to be agents or representatives of BIG BEAR and OWNER shall have no right or authority and shall not attempt to negotiate or enter into contracts or commit-

ments of any nature in the name of or on behalf of BIG BEAR, to bind or obligate BIG BEAR in any respect whatsoever, to make any agreements or incur any debts or liabilities of any kind on behalf of BIG BEAR, to negotiate a change in the benefits of the insurance program or insurance coverage provided herein, to contract for or accept merchandise or services on behallf of BIG BEAR, or to alter any arrangements of BIG BEAR relating to the master lease, equipment leases, and maintenance and supplier agreements.

OWNER shall have the sole right to employ and discharge such employees at his store as in his judgment may be necessary and such employees shall be employees and agent of OWNER and not of BIG BEAR. OWNER agrees to exercise full and complete control over and have full responsibilty for any and all labor relations, including the hiring, firing, disciplining, compensation and work schedules of his employees.

OWNER shall pay the cost of any applicable state unemployment insurance, Social Security, payroll insurance, workmen's compensation insurance covering his employees, and any other similar expenses relative to OWNER'S relationship as an employer to his employees. Said costs will be actually paid by BIG BEAR and debited to OWNER'S Open Account.

OWNER agrees to give his full time to the operation of the above described store under

the BIG BEAR system, to record in the Cash Register at time of purchase all retail sales of merchandise including merchandise taken for personal use.

15. TERMINATION. OWNER may lose his franchise if he does not perform all terms and conditions of the Franchise Agreement and/or upon the occurrence of any of the following events:

a. Agreement of the parties.

b. OWNER fails to secure and keep currently effective such licenses and permits as are required herein.

c. The filing of a voluntary or involuntary petition in bankruptcy against OWNER is eminent, in the opinion of BIG BEAR; OWNER makes an assignment for the benefit of creditors; or, a receiver or trustee is appointed for all or substantially all of the assets of OWNER.

d. The leased premises, in the opinion of BIG BEAR, are destroyed or rendered unfit for the operation of a convenience food store by fire, flood, windstorm or other casualty, or eminent domain.

e. Failure by OWNER to request and receive any approvals required under this agreement to be obtained by OWNER.

Thereafter, follows the portion of the agreement under the heading "Accounting and Inventory."

16. DEFINITIONS.

* * *

17. OPENING INVENTORY.

* * *

OWNER'S INVESTMENT.

* * *

19. OWNER'S OPEN ACCOUNT. BIG BEAR shall establish separte books of account for all of the transactions contemplated by this agreement. Said books of account shall be collectively referred to as OWNER'S Open Account. OWNER agrees to deposit all sales receipts daily with BIG BEAR, and said receipts shall be credited to OWNER'S Open Account. BIG BEAR will pay for all expenditures required to be made in the operation of the business, and said expenditures shall be debited against this account. The unpaid balance of OWNER'S investment shall be debited against this account which shall be entitled OWNER'S OPEN ACCOUNT. Such OWNER'S OPEN ACCOUNT shall also be debited with all disbursements made by BIG BEAR on behalf of OWNER in accordance with this agreement and shall be credited with all gross receipts deposited with BIG BEAR by OWNER in accordance with this agreement.

20. ACCOUNTING SERVICE.

* * *

21. OWNER'S DRAW ON ANTICIPATED PROFITS. On a weekly basis, BIG BEAR shall remit to OWNER and shall debit OWNER'S Open Account with the sum of $425.00 for remittance to be made on the first Wednesday of the first complete week of operation and to end on the last Wednesday of operation, which amount may be changed on written request from OWNER and approval of BIG BEAR. The amount so charge against OWNER'S Open Account may not be reduced at the close of the fiscal year, or any quarterly accounting period, by reason of the falure of OWNER to show a profit in the operation of the business. However, OWNER'S Open Account shall be debited with said remittances until the total thereof has been amortized.

22. BIG BEAR CHARGE. For and in consideration of the above described Lease, Franchise, license agreement, utilities and the services to be performed by BIG BEAR, OWNER agrees to pay BIG BEAR at the end of each quarterly accounting period, and BIG BEAR shall debit OWNER'S Open Account with a "BIG BEAR CHARGE" which shall be an amount of money equal to 40% of OWNER'S Net Operating Income.

It is mutually agreed that in consideration of BIG BEAR'S having provided OWNER with an opening inventory, that OWNER agrees to pay BIG BEAR at the end of each quarterly

accounting period, and BIG BEAR shall debit OWNER'S Open Account with a Principal Payment which shall be an amount of money equal to 50% of OWNER'S Net Profit until said initial inventory has been paid in full.

It is hereby mutually agreed that contemporaneously with the close of BIG BEAR'S fiscal year, there shall be an annual accounting whereby the profit and loss statement for OWNER'S store will be annualized with all of the other stores in the BIG BEAR system, and variations in the quarterly statements will be debited or credited to OWNER'S Open Account as appropriate. When the net operating income for the store has been determined on an annual basis, then BIG BEAR shall pay to OWNER 60% of the net operating income, less amounts taken, as provided above, for reduction of the Promissory Note for initial inventory, and less amounts reasonably necessary to continue operation of the store, and BIG BEAR shall debit OWNER'S Open Account the amount of the BIG BEAR CHARGE as provided above.

Exhibit C, attached hereto and by this reference incorporated herein, provides the method of allocaton and determination of all expenses incurred by OWNER.

23. FINAL ACCOUNTING.

* * *

24. ASSIGNMENT.

* * *

25. NOTICES.

* * *

26. EFFECTIVE DATE.

* * *

27. EXECUTION — COMPLETE AGREEMENT.

* * *

28. TRADING STAMPS.

* * *

29. SUPERVISION. BIG BEAR shall provide such supervision and technical assistance to OWNER in the operation of the business as may be reasonably necessary to establish the business, and in any event no less supervision than is provided to other markets in the BIG BEAR system.

There are various attachments to the agreement. One such attachment is designated as Exhibit A and contains a copy of the lease between Mabee and the Respondent. It is 11 pages long and is typed single-spaced on legal size paper. Another attachment is designated as Exhibit B and contains a list of the equipment. Exhibit C is on a profit and loss statement form with specific provisions typed in for each

applicable item. For example, "Sales—Deposited Directly in Open Account." Also attached is an escrow settlement statement; a proof of publication of a Fictitious Business Name Statement, and an installment note.

Other types of franchise agreements pertaining to seven other companies were introduced into evidence by the Respondence as Respondent's Exhibit 4. The other companies are: The Southland Corporation for a 7-Eleven Store; Convenient Food Mart, Inc.; Alpen Pantry, Inc.; Judy's Foods, Inc.; Chicken Delight Division of El Centro Foods, Inc.; Pop Shoppes of America, Inc.; and Marie Callender Pie Shops, Inc.

The findings of fact set forth in this section are based upon documentary evidence.

H. The Hiring of New Employees and the Transfer of Respondent's Employees to Other Stores

About 250 applicants for employment at the La Mesa store were interviewed by Richard Holmes. He placed an advertisement in *The Evening Tribune* for applicants, and he conducted the interviews in a vacant building in San Carlos. The building was not one of Respondent's facilities. Richard Holmes made the decision as to which employees would be hired. He did not offer jobs to any employees who were working for the Respondent at the La Mesa store with the exception of the part-time janitor. Richard

Holmes said that he was the one who made that decision. At the time of the trial, there were 16 employees at the La Mesa store.

The parties also stipulated to the following facts:

> The number of employees that were employees of Big Bear Super Market No. 3 at the La Mesa Store prior to November 15, 1976 were twelve.
>
> The number of employees that were employees of Richard A. Holmes at the La Mesa store after November 15, 1976 were thirteen.
>
> With the oxception of the part-time janitor, none of the employees who were hired by Richard A. Holmes, after November 15, 1976 were the same employees as were employed by Big Bear Super Market No. 3 prior to November 15, 1976 at the La Mesa store.

In addition to the foregoing, the parties stipulated that:

> Those persons employed by Respondent prior to November 15, 1976, at Big Bear Store No. 13 located at 8745 Broadway, Las Mesa, California, were transferred to other Big Bear stores without being given the option of seeking continued employment at the La Mesa store after November 15, 1977.

The parties further joined in the following stipulations:

(a) Respondent did not give notice to Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO (herein called Local No. 229) that it was contemplating transferring employees represented by Local No. 229 at Big Bear Store No. 13 in La Mesa to other Big Bear Stores, and respondent did not notify Local No. 229 that these same employees had been transferred.

(b) Respondent did not notify Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO (herein called Local 1222) that it was contemplating transferring employees represented by Local 1222 at Big Bear Store No. 13 in La Mesa to other Big Bear Stores and Respondent did not notify Local 1222 that these same employees had been transferred.

According to Tom Vandeveld, president of the Charging Party Retail Clerks, he never received any notice from the Respondent, Gerald Holmes or Richard Holmes that the La Mesa store had been sold or transferred, or that the employees previously at the La Mesa store had been transferred to other stores. Instead, he said that he learned of these facts from the Union's business agents.

The parties also stipulated that the Respondent did not give notice directly to the Charging Party Meat Cutters, prior to the events which took place

in November 1976, of the Respondent's intent to in any way alter the status of the La Mesa store.

Although Vandeveld stated that there were layoffs about November 15, 1976, in the other stores of the Respondent to which the La Mesa employees were transferred, Gerald Holmes recalled having conversations with Mabee prior to November 15, 1976, in which Mabee told him that there were to be no layoffs of employees or reductions in hours. Gerald Holmes acknowledged at the trial that he did not have personal knowledge whether or not this had occurred. Mabee, however, said that he was not aware that employees had been laid off or had their hours reduced.

The findings of fact in this section have been based upon the testimony of Richard Holmes, Vandeveld, Gerald Holmes and Mabee, as well as stipulations by the parties. As to whether or not there were layoffs and reductions in hours around November 15, 1976, I find the evidence is insufficient to support such a finding. There is the general assertion that there were, but no specifics or details were supplied. Gerald Holmes recalled Mabee's instructions against having layoffs and reductions, and Mabee himself indicated that he was not aware of any. In other matters at the trial, Mabee was very knowledgeable about so many facets of the Respondent's business and related matters, that it seems very unlikely that such lay-

offs and reductions, which were contrary to his instructions, would have escaped his attention.

I. The Operation of the La Mesa Store Under Richard Holmes

With regard to labor relations and personnel matters at the La Mesa store, Richard Holmes makes the decision concerning the hiring of employees; the firing of employees; the setting of wage scales to be paid the employees; the scheduling of the hours of work of the employees, and the determining of the working conditions for the employees.

The employees are paid lower wage rates than those employees who were working at the La Mesa store prior to November 15, 1976. While the Respondent's main office does the scheduling of the produce employees and the meat department employees in the Respondent's stores, Richard Holmes does that scheduling at the La Mesa store. In addition, he sets his own hours of work. Both his wife and his mother work at the La Mesa store without pay.

The Respondent has a rule against employing both a husband and a wife. According to Mabee's recollection, the rule had been broken only on one occasion. That was when a man and a woman, who were already employed in one of the Respondent's stores, got married. The Respondent requested that one of them leave their employment, but they declined to do so and took the matter to the Retail Clerks. After negotia-

tions with the Retail Clerks, the Respondent backed down from its position that one of them must quit, and instead, the Respondent placed the husband and wife in different stores.

During the first 3 weeks of operation under Richard Holmes, supervisors from the Respondent came in and helped with the produce department and the meat department with technical knowledge. Since that time, supervisors from the Respondent come into the store less than once a week. Richard Holmes estimated that within a 2-week period all four such supervisors would be in his store. They are the grocery supervisor; the meat supervisor; the produce supervisor; and the deli supervisor. He said that they spoke with the produce man and the head meatcutter. However, Richard Holmes testified that if a supervisor observed that a clerk in the store was doing something wrong, he would not tell that clerk that he was doing it incorrectly.

Mabee stated that he had been to the La Mesa store only twice since Richard Holmes took over operation of that store.

Richard Holmes said that he had the discretion as to whether to open the La Mesa store on holidays. He pointed out that a manager for the Respondent would not have such discretion. He acknowledged at the trial that he had not done so, but if he decided

not to open on a holiday, it would be specified in the Respondent's advertisement.

Advertisements in local newspapers for the La Mesa store have not been placed by Richard Holmes, but he said that he had carried promotions in the store as "manager's specials" for a period of 30 days or so.

Restrictions are not placed on Richard Holmes with regard to his selection of suppliers. Additionally, he said that he could order anything which he wanted to order, and that he had made specialty orders. He explained that as a manager in one of the Respondent's stores he could not have ordered from certain suppliers without the approval of the headquarters office. For reasons of economy and convenience to himself, Richard Holmes orders his produce from the Respondent's warehouse, although a majority of the time, he prices the produce at his store higher than the Respondent's pricing guide. He also orders the meat for the La Mesa store through the Respondent's central office.

A license to sell beer and wine is held by Richard Holmes, and he purchases his beer and wine directly from Gallo and Italian Swiss Colony. The bills from those companies are sent to the La Mesa store and then forwarded to the Respondent's accounting department which Richard Holmes utilizes.

All of the licenses necesseary to carry on the business are held in Richard Holmes' name. With regard to fire and liability insurance, Richard Holmes pays premiums in his name to the Respondent and is covered under the Respondent's insurance package.

Meetings for the store managers of the Respondent are held approximately once a month. Since November 1976, Richard Holmes has attended only one or two such meetings. He said, "If it is not relevant to me, I don't go."

The determination as to whether charitable contributions will be made by the La Mesa store rests with Richard Holmes. When he was a store manager for the Respondent, he said that such decisions were made at the Respondent's central office.

Customers who use food stamps for purchases at the La Mesa store receive their change in script which is provided by the Respondent's main office.

There are approximately 20,000 various products carried by the La Mesa store. Between November 1976 and the time of the trial in September 1977, Richard Holmes estimated that he had made about 200 or 300 additions and deletions of products at the store. He deleted the Candy Kids line of products, which he acknowledged had also been eliminated from some of the Respondent's stores by Gerald Holmes. He also deleted the La Mesa and Cremettes line of

spaghetti and lasagna which had been carried at the store. He pointed out that a store manager for the Respondent would have had to obtain approvel before discontinuing that line of products, which he said was still carried in the Respondent's stores. He also deleted a line of shoes at the store, and he changed ice companies. He added a Sparkletts water vending machine on his own volition. As a store manager for the Respondent, he said that he could not have done so without prior approval. Richard Holmes pointed out that he receives the proceeds from the Sparkletts water sales.

An extensive health foods line was added by Richard Holmes at the La Mesa store, and he added a fancy food section—primarily Japanese foods—to the store. He acknowledged at the trial that he knew that three other stores of the Respondent had fancy food sections, and he knew of two such stores with health foods. However, he pointed out that when he was the manager of Respondent's Store Number 12, he did not use his discretion to add a health food line, but instead he asked permission of his grocery supervisor who, after some talking, agreed to adding a small section.

In addition to the foregoing, Richard Holmes added certain Knudsen products to the store which had not previously been carried. He obtained shelving and revamped just about every shelf in the entire

store. He also moved a flower display and he moved the card racks to another location within the store.

He acknowledged that he had the same number of cash registers as before, and that the store was essentially the same inside as previously with the added shelves and rearrangements described above.

Richard Holmes receives a copy of the Respondent's standard pricing manual for grocery items only. When he was a manager for the Respondent, he followed the pricing manual, but now he does not always follow it.

With regard to this subject, the parties entered into the following stipulation:

> The La Mesa store is the only franchise outlet of Big Bear. Richard Holmes operates the La Mesa store Monday through Saturday 9 A.M.-9 P.M. and Sunday 10 A.M.-7 P.M. which are the same hours of operation that the store maintained prior to November 15, 1976.
>
> These hours of operation are the hours of operation followed by all Big Bear meat retail grocery chains in San Diego County.
>
> Pursuant to the Franchise Agreement, Richard Holmes honors all advertised specials of Big Bear.
>
> Richard Holmes exercises his option to purchase Big Bear "house brand" products.

After the agreement was signed and before Richard Holmes took over operation of the store, he advertised for employees in the newspapers, rented an office completely seperate and apart from Big Bear Markets for the purpose of interviewing employee applicants. He interviewed approximately 250 applicants and he hired 12 employees. He sets wages, hours and conditions of employment for each of his employees. He hires and fires his employees. His wages and fringe benefits are less than those provided in the respective collective bargaining agreements.

Richard A. Holmes has elected to use the Big Bear Accounting System as provided in the franchise agreement, including deposit of receipts and payment of obligations by Big Bear Super Market No. 3, except that Richard Holmes maintains his own business payroll account from which he personally pays all of his employees.

Richard Holmes submits weekly time cards designating wages and hours to the Big Bear accounting department which computerizes the time cards and provides a print-out with all deductions taken out. Big Bear then issues a check for the amount of the wages reflected in the computer print-out, which amount is debited to Richard Holmes' open account.

Business Agent Stegman of the Charging Party Meat Cutters was familiar with the meat departments

in the major chain supermarkets in the San Diego area. Most of the independent supermarkets in San Diego County purchased their meats locally, as did the Respondent. However, certain markets, such as Safeway, Alpha Beta, and Food Basket, purchased their meats from their own facilities.

The tools used by employees in the various retail meat markets in the San Diego area are basically the same. Each of the meat markets has a display for meats, a holding cooler, and cutting tables. The products handled are generally the same, and the cuts of meat are similar.

President Vandeveld of the Charging Party Retail Clerks said that he had visited the La Mesa store recently prior to the trial. He observed that the signs, shelf tags, and grocery bags were the same as used in the Respondent's stores. He also noticed that Green Stamps were given to customers as was done in Respondent's stores.

During cross-examination by the attorney for the Respondent, Vandeveld gave the following testimony concerning stores within the jurisdiction of the Charging Retail Clerks:

> Q. Okay. Now, you say you have seven chains under your jurisdiction. Can you tell me what those chains are, please?

A. Vons, Safeway, Alpha Beta, Food Basket, FedMart, Gemco, Big Bear.

Q. Okay. That is seven. Okay. Do you get into various stores of various chains on a regular basis?

A. Yes.

Q. So when you go into Vons—would you say you go into a Vons store once a week?

A. Not that often probably.

Q. Once every two weeks?

A. More like once a month.

Q. Okay. Safeway?

A. Safeway more frequently.

Q. Alpha Beta?

A. Once or twice a month.

Q. Food Basket?

A. Once or twice a month.

Q. And Big Bear?

A. Big Bear probably once a week. I have a Big Bear right where I live and I shop there.

Q. Okay. When you go into various Vons stores, do they sell meat?

A. Yes.

Q. They sell produce?

A. Yes.

Q. Do they sell general grocery items?

A. Yes.

Q. Do they sell non-foods?

A. Yes.

Q. Do they have their check stands in the front of the store?

A. Right.

Q. Do they have their doors in the front of the store?

A. Yes.

Q. Or maybe near the front, perhaps would be a better question?

Do they have aisles?

A. Yes.

Q. With gondolas?

A. Yes.

Q. And shelving and that sort of thing?

Do they have deli cases?

A. Yes.

Q. Do they generally cluster their deli cases in the vicinity of their meat counter?

A. Yes.

Q. When you go into Safeway, do they have all the things that Vons have?

A. Well, you know, the food stuffs and so forth. Maybe they have different brands, but general merchandise is the same.

Q. Okay. How about Alpha Beta?

A. Same.

Q. And Food Basket?

A. Right

Q. And Big Bear?

A. Same.

Q. Okay. Do they all carry—with the exception of house brands, do they all carry pretty much the same products?

A. Yes.

Q. They all carry flour and eggs and milk and meats and—

A. Yes.

Q. They all carry pretty much the same cuts of meat?

A. Yes.

Q. Okay. In terms of grocery lines — canned peas, frozen foods and things like that, do they all carry pretty much the same products?

A. Yes.

Q. Would it be fair to say then that supermarkets as an industry operate pretty much the same; they have the same equipment, freezers, gondolas and so on?

A. Yes.

Q. They have pretty much the same product line?

A. Yes.

Q. And the only real differences would be in perhaps house brands?

A. Yes.

Q. Would it be fair to say that the FedMart and the Gemco operations are somewhat different than the other chains in the county?

A. Yes. Different from the supermarket, yes.

Administrative Assistant Platten of the Charging Party Retail Clerks recalled a conversation with the store manager of the Respondent's San Carlos store which took place in 1973 or early 1974. Platten had inquired of the store manager regarding the manager's authority to move stock in the store from aisle to aisle, or from gondola to gondola. The store manager told Platten that he did not have widespread power of that nature without approval from a supervisor of that store, but that he had some discretion in placing items which he felt would be more profitable for the area in which the store was located. He contrasted his authority with what he perceived to be the straight schematic policy in the Alpha Beta stores in California. He indicated to Platten that items in any Alpha Beta store would be on the same shelf and on the same aisle.

Platten gave other examples of situations where a store manager of the Respondent had exercised his own judgment in the store. He recalled one occasion where the person who later became the store manager of the San Carlos store made the decision as to where to set up a Halloween candy display. He also related that the store manager at the El Cajon store had a discussion with one of the frozen food distributors as to whether to purchase a "manager's special" to put in the end freezer display. Platten also said that the store managers had the discretion to go beyond the Respondent's policy in cashing checks. He stated

that at the San Carlos store there was some revamping of sections about every 2 or 3 months while he was employed there. He recalled the revamping of the baby foods and diaper section at the store.

According to Platten, the store managers instructed the clerks to substitute another product when advertised items ran out of stock. He also said that store managers placed damaged packages and dented canned goods into a "bargain corner."

With regard to the pricing of products, Platten said that if the price list was lost, if the office was closed late at night, and if another store did not have the price listed in the Respondent's price book, then in those circumstances the store manager would assign a price to the item. He said that this happened especially with regard to Japanese food.

Platten said that he had observed Sparkletts water coolers at two of the Respondent's stores. In addition, he said that the manager of the San Carlos store had changed ice distributors on two or three occasions.

In 1975, Platten had a conversation with the store manager of one of the Respondent's Jonathan's stores. The store manager told Platten that he felt that he had more discretion at the Jonathan's store, and made the point to Platten that he had input on deciding that certain items would go into the Jonathan's advertisement.

According to Business Agent Daly of the Charging Party Retail Clerks he visited the La Mesa store on a weekly basis from about May 1976 to November 15, 1976, Since that time, he has visited the store on two or three occasions—the last time being about 2 days prior to the trial in this proceeding when he was in the store for 15 or 20 minutes.

In Daly's view, there were no major changes in the physical layout of the store. He said, for example, that the meat department, dairy department and produce department were located in the same areas as before. He noticed that the signs outside the store were the same and that there were Big Bear signs inside the store. He purchased some items in the store and observed that Big Bear grocery bags were used.

Business Agent Lemieux of the Charging Party Retail Clerks said that he had been in the La Mesa store in December 1976. In his opinion, "everything was the same," and that "there was no change at all." He said that he observed that the employees were also wearing the same color aprons as he had seen before.

Charging Party Retail Clerks' Exhibit 1 is a 2-page advertisement which appears in *The Evening Tribune* newspaper on September 7, 1977. The ad lists numerous items and the prices of those items available at Big Bear supermarkets. Among the 22

store locations listed in the advertisements is, "La Mesa, Highway 94, at Campo." Respondent's Exhibit 2, which is also a newspaper advertisement, indicates that the special sale on the brand of beer advertised was not available for sale at the La Mesa store. It was explained by Mabee that the Respondent's beer and wine warehouse does not supply those products to the La Mesa store. As noted earlier, Richard Holmes has his own beer and wine license and makes those purchases directly from suppliers, which avoids conflict with the State of California law.

The findings of fact in this section rest primarily upon the testimony given by Richard Holmes, Mabee, and stipulation of the parties. However, to the extent that their testimony is not inconsistent with the foregoing, I have also based findings of fact upon the testimony of Stegman, Vandeveld, Platten, Daly, and Lemieux as noted above. In addition, the findings of fact rest upon the documentary evidence referred to in the foregoing paragraph.

J. The Conversation Between Augustus Fougeron and Richard Holmes

Richard Holmes had a brief conversation with Augustus Fougeron in late November 1976 at the La Mesa store. Fougeron is an International Representative of the Charging Party Meat Cutters.

After Fougeron had introduced himself, Richard Holmes told him that he was the new owner. Fougeron inquired if Richard Holmes was going to continue to bargain with the collective bargaining unit. Richard Holmes replied that he ". . . planned on running an open shop."

August Fougeron did not appear at the trial to testify. However, the parties stipulated as to what his testimony would be if Fougeron had been called to testify, but with the caveat "without admitting the truth thereof." The parties stipulated as follows:

> The undersigned parties stipulate that (without admitting the truth thereof) if called to testify Gus Fougeron would testify as follows: On or about November 15, 1976, Augustus Fougeron, International Representative of the Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO herein called the meat cutters spoke with Richard A. Holmes at Big Bear Store No. 13, in La Mesa, California. Fougeron asked what had happened to the meat cutters represented by the Meat Cutters who had been working at that store. R. Holmes stated that he was the new owner of Big Bear Store No. 13 and that Big Bear Supermarkets, respondent, had transferred all the employees in question to other Big Bear Stores. Fougeron then asked if R. Holmes was contemplating becoming a union store and Holmes replied that he was absolutely not go-

ing to become Union, and that he was going to remain non-union.

The two versions of the foregoing conversation are not in substantial dispute on any material matter in this proceeding. However, I found Richard Holmes to be a credible witness on other matters, and I will accept his version of this conversation, and base the findings of fact on his testimony.

K. The Conversation Involving Marc Lemieux at the La Mesa Store

Marc Lemieux, a Business Agent for the Charging Party Retail Clerks, had a conversation with Richard Holmes at the La Mesa store. Lemieux approached Richard Holmes in the backroom where he was working and asked to talk with him. The two then went to the office. Lemieux presented a contract to Richard Holmes which indicated to him that, as a successor, he would have to continue bargaining with the Charing Party Retail Clerks.

Richard Holmes told Lemieux that the contract had not been signed by him, but instead it had been signed by the Respondent. Richard Holmes said that he would have to talk with his lawyer, although at the trial Richard Holmes stated that he did not have a lawyer at that time. He recalled telling Lemieux to see Respondent's lawyer, but he did not recall whether or not he mentioned Attorney Theep's name. At the trial, Richard Holmes said that he did not recall ever using Attorney Theep as his lawyer.

About that time, Gerald Holmes came in and greeted Lemieux. Then, a person who worked in a nearby restaurant came in to inquire about purchasing some flour at a discount. The man first spoke with Gerald Holmes, and then he spoke with Richard Holmes who declined to make the sale at a discount. Gerald Holmes left about the same time. Richard Holmes said that Gerald Holmes did not participate in any part of the conversation in connection with union representation.

Gerald Holmes recalled that in December 1976 he had gone by the La Mesa store in order to take his wife to lunch. While he was there, he went toward the backroom to see whether Richard Holmes would be able to go to lunch with them. On his way, he ran into Lemieux. The two men exchanged greetings, and at that point, a person from an Italian restaurant came in looking for flour. Because Richard Holmes was busy, Gerald Holmes said that he spoke with the man from the restaurant.

Gerald Holmes denied that he stated, "Richard, you shouldn't sign this, it has all been taken care of by the lawyers," and he further denied mentioning Attorney Theep's name to Business Agent Lemieux.

Lemieux's version is that he took three contracts in December 1976 to Richard Holmes at the La Mesa store. He gave the contracts to Richard Holmes in

his office to be signed. Richard Holmes told him that he did not know if he should sign this, whereupon Gerald Holmes told Lemieux that it had all been taken care of between the lawyers.

At that point, according to Lemieux, they were interrupted by a person who was seeking to purchase a large quantity of sugar. Lemieux said that Richard Holmes checked a copy of the Big Bear price and order book. Lemieux recognized it as being like those he had seen in other Big Bear supermarkets. After the unidentified person departed, Gerald Holmes advised Richard Holmes that he should not sign the contracts. Lemieux said that he then asked Gerald Holmes who was the lawyer, and that Gerald Holmes replied Mr. Theep and identified him as the lawyer for Big Bear.

After considering the foregoing versions of this event, I have decided to base the findings of fact in this section upon the testimony given by Richard Holmes and Gerald Holmes for the reasons previously stated.

L. The Request for Information by the Charging Party Retail Clerks

The parties entered into a stipulation with regard to the following facts:

> In or about late December, 1976 or early January, 1977, a representative of Retail Clerks

> Union, Local 1222, (herein Local 1222) telephoned Richard Holmes at his office at the Big Bear store in La Mesa and requested that Richard Holmes supply Local 1222 with the names and addresses of the current employees of the La Mesa store. Richard Holmes replied that he believed he had no obligation to supply such information to Local 1222 and that he believed that the supplying of such information would be an infringement of his employees' rights and that he would not supply that information.

The findings of fact in this section are based upon the foregoing stipulation.

M. Conclusions

In *Crawford Door Sales Company, Inc.*, 226 NLRB 1144 (1976), the Board commented on certain factors where the Board generally has found *alter ego* status:

> The Administrative Law Judge also found that Respondent Cordes was not Respondent Crawford's *alter ego* because in his view identical corporate ownership is the *sine qua non* of *alter ego* status. We disagree. Clearly each
>
> case must turn on its own facts, but generally we have found *alter ego* status where the two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership. See, e.g., *Marquis Printing Corporation*, 213 NLRB 394 (1974).

> In sum, it is apparent that both Respondents at all times material were wholly owned by members of the Cordes family and never lost their character as a closed corporation. In these circumstances, we find that ownership and control in both enterprises is substantially identical. In view of the foregoing, and the other factors which reveal common business purpose, management, operations, equipment, customers, and supervision, we find that Respondent Cordes is the *alter ego* of Respondent Crawford.

Among the several factors commented upon by the Board in the *Crawford Door* decision is the matter of "supervision." I discuss that subject first because it seems to me that the facts in this case are very clear as to that matter. Looking first at the franchise agreement, Section 14 spells out specifically the authority which is to be exercised by Richard Holmes concerning his employees in his operation of the La Mesa store:

> OWNER shall have the sole right to employ and discharge such employees at his store as in his judgment may be necessary and such employees shall be employees and agent of OWNER and not of BIG BEAR. OWNER agrees to exercise full and complete control over and have full responsibility for any and all labor relations, including the hiring, firing, disciplining, compensation and work schedules of his employees.

Significantly, the testimony of Richard Holmes shows that he has exercised his authority with regard to supervision and personnel matters. He did the initial interviewing of applicants for employment and made the decision as to who would be hired. He sets the wage scales for the employees at the La Mesa store, and those wage rates are different than those previously in effect under the Respondent's operation of the store. He schedules the hours of work of the employees, and he determines their working conditions.

Section 29 of the franchise agreement provides: "BIG BEAR shall provide such supervision and technical asssistantce to OWNER in the operation of the business as may be reasonably necessary to establish the business, and in any event no less supervison than is provided to other markets in the BIG BEAR system." As the testimony shows, those visits to the stores by various supervisors from the Respondent are more in the nature of "technical assistance" rather than day-to-day supervison of employees who work at the La Mesa store.

In *The Southland Corporation, d/b/a Speedee 7-Eleven*, 170 NLRB 1332 (1968), the Board concluded that the franchisee in that case was an independent contractor, and additionally, the Board concluded that the franchisor and franchisee were not joint employers. In weighing the facts as to the first issue of independent contractor status, the Board stated:

> Under the franchise agreement, exclusive control over labor relations is vested in the franchiseee. Article 14 of the franchise agreement states in relevant part: "Owners [franchisees] agree to exercise full and complete control over and have full responsibility for any and all labor relations, including the hiring, firing, disciplining, compensation and work schedules of their employees."
>
> Although Southland makes out the wage checks to employees, this is merely a convenience for the franchisees, who furnish Southland's computer with all relevant wage information whereupon Southland routinely makes out the checks in the appropriate amounts. The franchisee's account is debited accordingly.
>
> There is no evidence that Southland has even exercised any control over any of the terms of employment of the store employees.

Moreover, in addressing the second issue of whether the franchisor and franchisee were joint employers in *The Southland Corporation* case, the Board stated at page 1334:

> We have long held that the critical factor in determining whether a joint employer relationship exists is the control which one party exercises over the labor relations policy of the other. It is immaterial whether this control be actually exercised so long as it may potentially be exercised by virtue of the agreement under which

> the parties operate. In the instant case Southland neither exercises actual, nor possesses potential, control over the store's labor relations under the franchise agreement. It is undisputed that George alone and exclusively hires, fires, and in every other respect sets the terms and conditions of employment of the store's employees. There is no evidence that the clear language of article 14 of the franchise agreement granting complete control over store labor relations to the franchisee has even been disregarded by the parties or that Southland has ever sought to interpret the agreement in such a way as to vest in itself the right to influence George's labor relations policies.

Considering the facts with regard to labor relations, personnel matters and supervision of employees, I conclude that those facts favor the finding that Richard Holmes is not the *alter ego* of the Respondent in his operation of the La Mesa store. Furthermore, the conversation which he had with Fougeron, Lemieux and a representative of the Charging Party Retail Clerks, who requested the names and addresses of his employees, are consistent with Richard Holmes' position of not being the *alter ego* of the Respondent.

Turning now to a consideration of the factor of the "business purpose," it is clear that the La Mesa store was a grocery supermarket both before and after November 15, 1976. Thus, in a strict sense, the purpose of the business remained the same, *ie.*, to sell groceries and other products at retail to customers.

In addition, looking at the factors of "equipment" and "customers," it seems reasonable to conclude that these remained substantially as they had prior to November 15, 1976. The lease for the premises, which is attached to the franchise agreement as Exhibit A, and the description of the equipment, which is attached to the franchise agreement as Exhibit B, are indicative that the basic "equipment" for doing business at the La Mesa store location remained substantially the same. The factor involving the "customers" is more difficult to ascertain in a retail enterprise. A manufacturer or a wholesaler, for example, would be expected to have a list of his customers. A retail grocery supermarket on the other hand, would not be expected to have such a definitive list. In these circumstances, a basis for inferring that most customers continued to shop at the La Mesa store after November 15, 1976, as they had previously, is that the store continued in the same location without any interruption of business, and the store continued to use the Big Bear name and be listed among the stores in the Big Bear advertisements. Furthermore, the fact that Richard Holmes was able to turn around the business from a loss situation to a profitable situation within a few months time is some indication that former customers continued to shop at the store, although it could also mean that new customers were attracted to shop there.

In examining the factor of "ownership," the basic question is whether the franchise agreement between

the Respondent and Richard Holmes is a *bona fide* transaction or a sham. It is helpful to consider the matters which led to the Respondent's decision to franchise the operation of the La Mesa store. These have been set forth in Section E herein, but in summary, they concern the fact that the La Mesa store had suffered losses under the Respondent's operation in the 2 fiscal years preceding the decision to enter into a francise; the desire on the part of the Respondent not to give up any more of its market share in the greater San Diego area; and the fact that Mabee owned the shopping center in which the La Mesa store was located and was concerned about the effect of the loss of the Big Bear name in drawing customers to the center.

The testimony of Mabee was convincing and persuasive that these were the true reasons which led him to make the decision to franchise the operation of the La Mesa store. In a similar manner, Mabee's testimony was convincing with regard to his reasons for deciding to make the first offer to Richard Holmes. At the time Richard Holmes was the manager of one of the high volume stores of the Responent, yet Mabee had knowledge of the fact that Richard Holmes had multiple sclerosis which had an effect on his continued performance as manager of that store. Not to be overlooked is the fact that Richard Holmes was the son of Gerald Holmes, who had been the Secretary-Treasurer of the Respondent for 20 years. Given these circumstances, it seems logical that Mabee would have

decided to make the offer to franchise to Richard Holmes, but more importantly, I conclude that the evidence does not establish that the selection of Richard Holmes as a franchisee was a subterfuge by which the Respondent would continue to operate the store.

I have given consideration to the fact that the initial cash payment required of Richard Holmes was only $2,000. However, Mabee's testimony concerning this fully explains Mabee's rationale for that figure. He said that he had known Richard Holmes and his background for 20 years, and he knew him to be a financially responsible person and stable individual. Morevore, Mabee anticipated repayment of the promissory note fairly rapidly. The facts bear out Mabee's anticipation as Richard Holmes had repaid over $18,000 on the note as of last July 31, 1977, in addition to the interest payments.

Section 21 of the franchise agreement entitled, "Owner's Draw on Anticipated Profits," and Section 22 of that agreement entitled, "Big Bear Charge" set forth the terms by which Richard Holmes may draw on his share of the profits and the provisions for 40 percent of the net operating income to go to the Respondent. It is significant that Richard Holmes has applied his total net profits to the repayment of the principal on his promissory note to the Respondent. His repayment of that amount is an indication that he is truly a franchisee and that the franchise agreement is not a sham.

While a store manager of the Respondent receives a bonus if his store makes a profit, he does not personally share in the losses if the store sustains a loss. Unlike a store manager employed by the Respondent, Richard Holmes, under the terms of the franchise agreement, shares in the profits, if any are made, and also must bear the losses, if that results. The point is that his sharing in the profits or the losses is an indication that he is an owner, rather than an employee.

Perhaps of less importance, but still a matter to ponder, is why would the wife and the mother of Richard Holmes commence working at the La Mesa store without any pay for their services unless Richard Holmes did, in fact, own his business. If the Repsondent still owned and operated the La Mesa store, it would seem to be improbable that Richard Holmes' wife and mother would be working without pay. On the other hand, their assistance to him without remuneration is logical if he owns his business.

Considering the matters discussed above concerning the "ownership" factor, I conclude that factor favors a finding that Richard Holmes is not the *alter ego* of the Respondent.

Weighing the factors of "management" and "operations." Section 14 of the franchise agreement states the intentions of the parties to that agreement: "It is the intention of the parties hereto that OWNER

shall be an independent contractor and exercise control over the manner and means of the operations of his business." The testimony of Richard Holmes is persuasive that he has carried out that intent of the parties, but of course, within the terms of the agreement. Section 10 entitled, "Inventory" does obligate Richard Holmes to stock items which are customarily carried in Big Bear stores and to stock such items in quantities which, in the sole judgment of the Respondent, are reasonably necesseary to meet customer demands. In addition, Richard Holmes must stock and sell advertised goods at the prices advertised by the Respondent and honor the Respondent's discount coupons. Section 13 of the franchise agreement gives the Respondent effective control over the advertising decisions.

Notwithstanding these oblgigations to stock the items customarily carried in Big Bear stores, Richard Holmes has not been precluded from adding or expanding product lines. For example, an extensive health foods line was added, and so was a fancy foods section, primarily Japaneses foods. Moreover, he has made some 200 to 300 additions or deletions of products handled by the La Mesa store.

Thus, while the franchise agreement obligates him to carry the basic Big Bear store products, it has not prevented his exercise of his judgment in adding, expanding or changing other products. After considering the foregoing and the other facts set forth

in Section I herein, entitled, "The Operation of the La Mesa Store Under Richard Holmes," I conclude that the factors of "management" and "operations" favor the finding that Richard Holmes is not the *alter ego* of the Respondent.

Finally, after considering the entire record and particularly the foregoing conclusions regarding the factors of supervision, ownership, management and operations, I conclude that a preponderance of the evidence does not establish that Richard Holmes is the *alter ego* of the Respondent in his operation of the La Mesa store, and that a preponderance of the evidence does not establish that the Respondent has violated Section 8(a)(1), (3) and (5) of the Act. *Cf. Frank Naccarato, a sole proprietor, d/b/a Naccarato Construction Company, et al.*, 233 NLRB No. 196 (1977); *Edward E. Schultz d/b/a Schultz Painting & Decorating Co.*, 202 NLRB 111 (1973); *Sakrete of Northern California, Inc.*, 140 NLRB 765 (1963); and *Charles T. Reynolds Sr. doing business as Charles T. Reynolds Box Company*, 139 NLRB 519 (1962).

I have given consideration as to whether the Respondent's lack of direct notice to the Charging Party Retail Clerks and the Charging Party Meat Cutters regarding the transfer of employees from the La Mesa store to other stores of the Respondent violated Section 8(a)(1), (3) and (5) of the Act. The agreed-upon provisions between the Respondent and the two unions have been set forth in Section D herein en-

titled, "The Collective Bargaining History." As noted there, the provisions of the agreements do not specifically require that the Respondent give advance notice to the unions, and in the circumstances here, where the Respondent ceased to operate the La Mesa store, I find that the lack of such notice did not violate the Act as alleged.

Conclusions of Law

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding, I make the following conclusions of law.

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party Retail Clerks and Charging Party Meat Cutters are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in the unfair labor practices alleged in the Consolidated Amended Complaint in this proceeding.

ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the recommended Order set forth below. In the event that no exceptions

are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Board's Rules and Regulations, be adopted by the Board and shall become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

IT IS HEREBY ORDERED that the complaint in this proceeding be dismissed in its entirety.

Dated: February 24, 1978.

ROGER B. HOLMES
Administrative Law Judge

NLRB v. TRANSCONTINENTAL THEATERS, INC.

U.S. Court of Appeals, Ninth Circuit (San Francisco)

NATIONAL LABOR RELATIONS BOARD v. TRANSCONTINENTAL THEATERS, INC., No. 75-2505, September 27, 1977, as amended January 12, 1978.

LABOR MANAGEMENT RELATIONS ACT

Discrimination—Refusal to Bargain—Single Employer—Lease Arrangement

NLRB held not warranted in finding that corporation that terminated certain employees after subleasing its movie theater to partnership violated Sections 8(a)(3) and (5) of LMRA, where relationship between corporation and partnership was that of independent contractor rather than that of employer-emplyoyee, even though theater and equipment belonged to corporation and it retained right to inspect theater to see if it was being operated properly; there was no common management of theater on day-to-day basis, and partnership, which was a separate business entity, operated theater independently of corporation's control.

Application for enforcement of an NLRB order (88 LRRM 1460, 216 NLRB 1110). Enforcement denied.

Michael Stein, Washington, D.C., for petitioner.

George King, Oakland, Calif., and Michael B. Roger, San Francisco, Calif., for respondents.

Before BROWNING and ANDERSON, Circuit Judges, and CRARY,* District Judge.

FULL TEXT OF OPINION

PER CURIAM:—The National Labor Relations Board (NLRB) seeks a judgment granting enforcement of the Board's order in the within matter. The Board's decision and order are reported at 216 NLRB 1110, 88 LRRM 1460.

The Transcontinental Theaters, Inc. (respondent), is a Delaware corporation engaged in the general business of operating movie theaters in various states, including California. The respondent admits it is engaged in inter-state commerce. It operates eight theaters in the San Francisco area and the theater here involved in a twin-screened theater (the theater) near San Francisco, in Fremont, California.

Cynatron Enterprises (Cynatron) is a general partnership, formed November 12, 1973, and licensed November 14, 1973, composed of partners Douglas Krutilek and Robert Shaw. Krutilek and Shaw have operated the theater pursuant to a one-year sublease between respondent and themselves, executed November 26, 1973, to take effect November 28, 1973. The

*Honorable E. Avery Crary, Senior United States District Judge, Central District of California, sitting by designation.

Board agrees that Cynatron alone would not meet the Board's jurisdictional standards and unless it is a *joint employer* with respondent or operates the theater with respondent as a *single enterprise*, the Board would not assert jurisdiction over Cynatron.

The Internation Association of Theatrical and Stage Employees, Local 169 (Local 169), and respondent were parties to a collective bargaining agreement covering the theater involved in effect from August 15, 1972, to August 14, 1976. Under that agreement, Local 169 furnished the theater with two projectionists, one worked for 35 hours per week and the second 18 hours per week.

Service Employees International Union, Theater Janitors Union Local 121 (Local 121), had a similar contract with respondent under which it employed two janitors, who together worked a toal of 42 hours per week. That agreement was in effect from February 15, 1973, to February 14, 1976.

The Fremont theater had operated at a loss since its opening in 1970. In 1971 the loss, before depreciation, was $3,215.00, in 1972 a loss of $2,862.00 and in 1973 at a loss of $46,182.00.

By letter dated November 7, 1973, respondent outlined to Krutilek and Shaw the terms and conditions under which it would sublease the theater. On November 12th, Krutilek and Shaw signed the letter

accepting the terms thereof for Cynatron. The same day, respondent notified the Local Unions 169 and 121, by letters of a sublease of the theater to Cynatron to be effective November 28th and that the Union employees would be terminated as of that date. The letters to the Unions also referred to the sections of their contracts with respondent concerning notice of termination.

Respondent ceased operating the theater on November 28th, 1973, and Cynatron took over its operation on that date, pursuant to the sublease referred to above executed on November 26th.

The Board found that the respondent violated Section 8(a)(3), (1) of the National Labor Relations Act, as amended, by unilaterally changing the terms and conditions of employment of its employees as contained in the collective bargaining agreements with the Unions and that the respondent violated Section 8(a)(5), (1) of the Act by discharging the Union projectionists and janitors who were, at the time, represented by the Unions under existing contracts. The consolidated complaint filed by the Board's general counsel alleges that respondent and Cynatron continued to act as *joint employers* in the operation of the theater and that the joint employers were bound to abide by respondent's contracts with Local 169 and 121. The Board concluded that respondent and Cynatron were *not* joint employers but that the sublease left respondent in a position of ownership and control

of the theater operation so as to make the partners in Cynatron the employees of respondent or, at best, agents or managers. 216 NLRB at 1113. We are not, therefore, concerned with a joint employer issue as alleged in the complaint.

Cynatron, a respondent before the Administrative Law Judge (ALJ), but not a party to the appeal herein, defended on the grounds the record did not establish a joint employer relationship, that the Board did not have jurisdiction over Cynatron's business operation and that Cynatron bargained in good faith with the Union.

Respondent contended and now contends that in subleasing the theater it was motivated by legitimate economic reasons and prior to entering into the sublease it gave the Unions ample opportunity to bargain relative to the decision to sublease and the effect on the employees involved. The record establishes that there had been a very good relationship between the Unions and respondent for many years prior to the sublease.

After receipt of the November 12th letter from respondent, the business agent of Local 169, on November 20, 1973, conferred with Krutilek and Shaw. The Union took the position that respondent still operated and controlled the theater in partnership with Cynatron and remained obliged to abide by the terms of the bargaining agreement. Cynatron offered Local

169 one 6-hour shift per week for a projectionist but that was unacceptable to the Union. The same offer of one 6-hour shift per week was made to Local 121 but was also rejected, and Local 121 voted to picket the theater. The charges of each Union were consolidated in the complaint prepared by the general counsel.

It is stated by the Board in its decision, page 1111, that the sublease, which was for a period of one year with option to renew for that period, contained provisions usually found in a standard lease agreement with further provisions defining the relationship between the parties. Section 33 provides that the respondent may terminate the sublease upon seven days notice if, in the respondent's judgment, Cynatron is not operating the theater "in a proper and business-like manner and in a manner not producing sufficient income." Section 34 provides that Cynatron pay the respondent $3,400.00 rent per month, 5% of the box office admissions and receipts over and above the said minimum monthly rental, and 5% of the gross receipts of the sale of merchandise, food and drinks. In addition, Cynatron was to pay respondent periodically an amount equal to 75% of the net profits as determined by respondent. The respondent was to determine the accounting periods for each year. Section 35 permits the partners to draw a collective salary of $250.00 per week as an operating expense. Section 36 says that the respondent and its agents

will assist Cynatron in buying and booking films and in determining the program until such time as Cynatron has had sufficient experience. Under Section 37 respondent will provide the forms on which Cynatron is to record the daily box office receipts, weekly payroll, confectionery inventory and manager's weekly report. Respondent is authorized by Section 38 to enter the theater at all reasonable times to determine whether Cynatron is properly maintaining and operating the theater. Section 39 provides that should Cynatron not promptly pay all bills and obligations it incurs in the operation of the theater the respondent shall have the right to terminate the sublease on 7 days notice. Cynatron was not required to invest any capital or make any security deposit pursuant to its arrangements with respondent.

It is to be noted that the master lease between respondent and the owner of the theater requires the respondent to furnish the owner with monthly reports similar to those required by Cynatron to be made to respondent under Section 37 of the sublease, supra, and that the master lease similarly provides that respondent pay the owner $3,400.00 per month rent plus 10% of ticket receipts and 5% of refreshment receipts less the amount of the fixed minimum monthly rental of $3,400.00.

Cynatron has hired eight employees since its operation of the theater began. The partners have themselves operated the projectors and each draws $200

a week salary. They have retained a part-time janitorial service at $120 per week.

The Board, with one member dissenting, rendered a decision contrary to that of the ALJ who had recommended and ordered dismissal of the portions of the consolidated complaint involved herein. The Board's decision does not cite any supporting authorities and rests primarily upon its conclusion that the respondent and Cynatron constituted a single integrated enterprise and that the partners were the employees of the respondent, issues not raised in the pleadings nor addressed during the administrative hearing. In holding that the respondent and Cynatron were a single enterprise, the Board found that the sublease allowed the respondent to maintain close and substantial control over Cynatron's day to day operations and permitted the two partners little leeway to assume the role of entrepeneurs. The Board found there was signicance in the subleasing in (1) that the partners were not required to pay any deposit on equipment, all of which belonged to the respondent, or post a bond to cover the property with which they were entrusted, (2) that the sublease circumscribed the amount of profit Cynatron was permitted to make, (3) that respondent was obligated to provide forms upon which Cynatron was to make its daily report, which the Board said tied Cynatron's bookkeeping in with that of the respondent, and (4) the right was reserved to the respondent to assist Cynatron in buying and booking films and determining programs

until Cynatron acquired sufficient experience and that, therefore, respondent had not relinquished its economic control and interest in the theater. Page 1112. As heretofore noted, the reports referred to in (3) above were required of respondent by the master lease.

As to respondent's control over Cynatron's labor relations, which may well be said to be a crucial issue, the Board found that the primary reason for respondent's decision to sublease the theater was that it was an unprofitable venture and that a major cause for that condition was its high labor costs, a factor of which was the wages and manning requirements of the collective bargaining agreements, and that in deciding to sublease the theater to Cynatron the respondent considered the fact that the partners were qualified to take over the work of the projectionists. The Board also found to be relevant to the matter of labor costs, the fact that respondent, by the letter of November 12th, supra, placed a ceiling on Cynatron's operating costs in that Cynatron was required to operate the theater within a mutually acceptable budget which included a ceiling on the weekly salaries that the partners could draw. The partner, Krutilek, testified, in substance, that the only purpose of this provision was to provide respondent with some gauge of Cynatron's proposed operations. This purpose is uncontradicted in the record and was obviously relied on by the ALJ. Since the ALJ is in

the best position to observe the demeanor and to determine the veracity of the witnesses, reviewing courts give his report (findings), "such probative force as it intrinsically commands." *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 495, 71 S.Ct. 456, 468, 95 L.Ed. 456, 27 LRRM 2373, 2381 (1951). The Board further found that the control given over Cynatron operations and labor costs was further evidenced by the respondent's right to cancel the sublease on 7 days notice whenever respondent determined the theater was not operated in a "proper and busineslike manner."

By maintaining a right to impose a ceiling on operating costs through the acceptable budget provisions, the Board concluded that the respondent had retained power to supervise and oversee the operations of the theater and could thus limit not only the number and kinds of employees to be hired but also the size of the labor budget. This was also the position taken by counsel for the Board during oral argument before this Court. The Board also concluded that the respondent, by limiting the number and kinds of employees to be hired as well as the size of the labor budget, had control of Cynatron's labor relations. The Board held that therefore the partners were the employees of respondent or, at best, its agents or managers and that there was no arm's length removal of the operation of the theater from respondent.

In prior decisions the Board has treated separate entities as one employer when their operations and ownership are highly integrated. The principal factors the Board has considered in this regard are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations and (4) common ownership or financial control. Emphasis has been placed on the first three factors. Sakrete of Northern California, Inc., 137 NLRB 1220, 50 LRRM 1343, aff'd 332 F.2d 902, 905, Note 4, 56 LRRM 2327, 2329 (9th Cir., 1964).

The Court of Appeals of the District of Columbia, in *American Federation of Television & Radio Artists* v. *N.L.R.B.*, 149 U.S.App.D.C. 272, 462 F.2d 887, 80 LRRB 2001 (1972), was concerned with the relations between a television station and a newspaper, both owned by the Hearst Corporation. The Court found the television station and newspaper to be separate "persons" under the National Labor Relations Act and, after setting forth the facts as to the relationship of the two entities, which were more integrated than the respondent and Cynatron, the Court states:

> "We think this summary of the evidence amply supports the Board's conclusion that at the time of the labor dispute WBAL and the News American were so independent of Hearst and so unrelated to each other that the News American was an unoffending employer within the meaning of the statute. Thus, the ultimate power to control each division belonged to

> Hearst, since each division manager was answerable to Hearst. As the Board correctly held, however, the test is not whether an unexercised power to control exists. 'There must be in addition such actual or active common control, as distinguished from merely a potential, as to denote an appreciable integration of operations and management policies.' Drivers, Chauffeurs and Helpers Local 639 (Poole's Warehousing, Inc.), 158 NLRB 1281, 1286, 62 LRRM 1197 (1966). * * *
>
> Here the record establishes that the Hearst Corporation's ultimate power to control has not been exercised." p. 892, 80 LRRM p. 2004.

In Gerace Construction, Inc., 193 NLRB 645, 78 LRRM 1367 (1971), the Board held:

> "A critical factor in determining whether separate legal entities operate as a single employing enterprise is the degree of common control of labor relations policies. Thus, the Board has found common ownership not determinative where requisite common control was not shown, and the Board has held with court approval that *such common control must be actual or active, as distinguished from potential control.*" [Footnotes with citations omitted.] [Emphasis added.]

The theater and equipment in the instant case belong to respondent and, although the respondent has the right to inspect the theater to see if it is

being properly operated, there is no common management on a day to day basis and it does not appear inspections were made by respondent as authorized. Respondent has no ownership interest in Cynatron. Cynatron has its own business license, maintains its own bank accounts and books of account, is solely responsible for paying its own operating expenses, sets its own admission prices and bids for its own films. As stated in the consolidated complaint, Cynatron has hired, fired, disciplined and supervised the employees employed at the theater since November 28, 1973. The complaint also treats the respondent and Cynatron as separate business entities asserting that they are joint employers. Although, as noted above, respondent reserved the right to assist Cynatron in booking films and determining programming until Cynatron acquired sufficient experience, Cynatron did its own bidding for and booking of films and there is no evidence that respondent made any attempt to control Cynatron in this regard.

This Court, in the *Sakrete* case, 332 F.2d 902, 56 LRRM 2327, supra, held that Sakrete of Northern California (SNC) was a single employer with Sakrete, Inc., whose operations were within the Board's jurisdiction. There was identity of ownership and management in a single person responsible for the setting of labor policies of both companies and who participated in the labor negotiations. None of these factors are present in the case at bench.

The facts in cases where the Board has found there was not a single employer status are substantially more indicative of single employment than those in the instant case. See Western Union Corporation, 224 NLRB No. 25, 92 LRRM 1443; Frank N. Smith Associates, 194 NRLB 212, 217-18, 78 LRRM 1603 (1971); Golf Course Inns of America, Inc., 199 NLRB 541, 81 LRRM 1621. In the latter case, the Board held the common owner had the "potential" to control the labor relations policies at the individual golf courses but the record did not show that he had done so. The Board said there were other factors which militated against treating the enterprises as one for jurisdictional purposes, to wit:

> "* * * there is no interchange of employes between the clubs, payrolls are separately maintained, purchases are separately and locally made, membership privileges are not interchangable, and each club has a separate general manager * * * [who] controls the day to day operations of [each] club, directs employees in their daily routine and has the authority to hire and fire employes." p. 532, 81 LRRM at 1622.

In the Southland Corporation Matter, 170 NLRB 1339, 67 LRRM 1582 (1968), the franchise agreement provided for many checks and controls by Southland, the owner and franchisor of the store, over one George, the franchisee and operator. Some of the controls were more stringent than those provided for in the within case. Southland did not exercise any

control over the labor relations of the franchisee, which control was vested in the franchisee by the terms of the franchise agreement. In the instant case the respondent did not exercise any control over the labor relations of Cynatron, who conducted its own labor relations although not specifically vested with that right under the agreement with respondent. The Board concluded that, in the circumstances, Southland and George were not a single employer nor were they joint employers as had been urged in the petition of AFL-CIO.

The Board has also applied the test of employee versus independent contractor in considering the single employer issue. As it stated in Clark Oil & Refining Corporation, 129 NLRB 750, 47 LRRM 1056 (1960):

> "The test of independent contractor status is whether the employer retains the right of control over the manner of performance of the contractor." pp. 756-57.

It is well established that to create an employer-employee relationship the control, by the person for whom the project or contract is to be performed, over the person who is to do the work must be as to the specific manner and means by which the result sought is to be accomplished. *Brown* v. *N.L.R.B.*, 462 F.2d 699, 706, 80 LRRM 2850 (9th Cir. 1972). In the *Brown* case, this Court reversed the Board's ruling

that the dealers/distributors of newspapers were the employees of the publisher, the Hearst Corporation, observing:

> "* * * the standards formulated by the Board in the cases in which it found dealers to be employees clearly indicate that the Dealers here are independent contractors rather than employees." (Cited cases in footnotes omitted.) pp. 702-03, 80 LRRM p. 2852.

and at p. 703 80 LRRM at p. 2853:

> "The means used and the respective controls in accomplishing these goals are, however, highly material to the ultimate determination of employee or contractor status."

There is no substantial evidence in the instant case, as outlined above, to support the Board's conclusion that there is a single employer involved or that the partners in Cynatron were employees of respondent. We conclude that the ALJ was correct based upon the facts, prior Board and court decisions, that the relationship of independent contractor existed.

The ALJ notes in his decision that it is alleged in the consolidated complaint that the respondent controlled the labor relations policy of Cynatron by its right to determine operating costs, including labor costs of Cynatron. The ALJ then observes he found that respondent did, in effect, have the power to place a ceiling on the theater's operating expenditures, how-

ever, in his opinion the impact of the power is too remote and conjectural to warrant a finding that respondent had any meaningful control over Cynatron's labor relations policies. We agree, particularly in view of the lack of evidence that respondent ever made an attempt to control Cynatron's labor relations or policies through its authority to determine operating costs or otherwise.

Judge Kennedy, in dissenting, after enumerating facts as to the relations between respondent and Cynatron and observing that the respondent "never attempted to participate in or influence a labor relations decision by Cynatron," states at page 1118:

> "All of which should leave one puzzled as to the reasons for prosecution of this case. But after more than 20 years of legal experience in the regions of this Board, my memory is refreshed by the trial attorney's candid concession on the record that:
>
> 'To be absolutely candid, one of the reasons I was having difficultiy answering your questions is I have been unable to find the answers myself because some bright legal theoretician in Washington came up with these violations based on case citations from which inferences are drawn.' "

The propriety of overruling the Board as to inferences to be drawn from the facts should the evidence call for inferences to the contrary or if

inferences are unreasonable in light of the record is discussed in *Kling* v. *N.L.R.B.*, 508 F.2d 1044, 88 LRRM 2385 (9th Cir. 1975).

At page 1046 the Court states:

> "Although decisions of the Board are entitled to great respect by a reviewing court, they will be set aside if the record clearly precludes the Board's decisions and the evidence calls for inferences contrary to those drawn by the Board. *Universal Camera* v. *NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456, 27 LRRM 2373; *NLRB* v. *Lenkurt Electric Co.*, 438 F.2d 1102, 76 LRRM 2625 (9th Cir. 1971)."

This Court, in *Brown* v. *N.L.R.B.*, supra, stated at page 702, 80 LRRM at page 2852:

> "The application of agency principles to the facts of a case is a proper subject for judicial review, and we may affirm the Board's determination only if we can conscientiously say that it is supported by the record considered as a whole."

Whether the Board's determination, that respondent and Cynatron were a single employer or that Cynatron was not an independent contractor, was based on inferences it drew from the facts in the case or the Board's conclusions of law as applied to the facts as found by the Board, it would appear its decision is subject to review by this Court both as to whether it is supported by substantial evidence on the record as

a whole and as to a reasonable drawing of inferences. The essential facts in this case are not in controversy but there is disagreement as to the inferences to be drawn from those facts and with respect to whether, under applicable law, the sublease and ongoing relationship between respondent and Cynatron resulted in a single business entity as concluded by the Board.

We conclude that there is insufficient evidence to support the Board's conclusion that Cynatron and respondent are a single employer or enterprise. Nor is there sufficient evidence that the two partners in Cynatron were either employees or agents of respondent. Instead, the record as a whole clearly indicates that Cynatron was an independent contractor whose control over labor and labor policies was completely separate from that of respondent.

A comment on one aspect of the dissent would seeem to be in order. In discussing the issue of employee and independent contractor relationships, it is not intended by the majority to imply that it is not the right to intervene but the control actually exercised which is to be considered in determining that issue. The majority's reference to that principle concerns separate legal entities and common ownership, not employee as compared to independent contractor. *American Federation of Television & Radio Artists* v. *N.L.R.B.*, 149 U.S.App. D.C. 887, 462 F.2d 887,

80 LRRM 2001 (1972); Gerace Construction, Inc., 193 NLRB 645, 78 LRRM 1367 (1971), supra.

The petition for enforcement of the Board's order is DENIED.

DISSENTING OPINION

BROWNING, Circuit Judge, dissenting: — The majority, it seems to me, crosses the line bewteen review and de novo determination. The Board's judgment is not accorded the deference that is its due. It is the Board's function, not the courts', to accommodate the employer's right to transfer his business and the union's right to a stable collective bargaining relationship, and, as part of the task, to evaluate the bona fides of a particular transfer of a particular business. See *NLRB* v. *Lewis*, 246 F.2d 886, 40 LRRM 2371 (9th Cir. 1957).

It is improper for a reviewing court to displace the Board's "choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488, 71 S.Ct. 465, 27 LRRM 2373, 2378 (1951). See also *NLRB* v. *Miller Redwood Co.*, 407 F.2d 1366, 1369, 70 LRRM 2868 (9th Cir. 1969); *Suprenant Manufacturing Co.* v. *NLRB*, 341 F.2d 756, 760, 58 LRRM 2484 (6th Cir. 1965). The Board has made such a choice in this instance. Indeed, a brief consideration of the law and facts will demon-

strate that the Board's view of the record is more reasonable than that adopted by the majority.

The Board did not find that respondent and Cynatron were a "single employer," as the majority suggests. The Board did find that "Shaw and Krutilek were [respondent's] employees, or at best its agents or managers." 216 NLRB at 1113. The majority finds instead that Shaw and Krutilek were independent contractors.

In distinguishing between independent contractors and employees for purposes of the Act, the Board and the courts must apply general agency principles. *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 256, 88 S.Ct. 988, 19 L.Ed.2d 1083, 67 LRRM 2649 (1968). The principal inquiry is the right of control respondent reserved over Cynatron's operation of the business. *Associated Independent Owner-Operators, Inc.* v. *NLRB*, 407 F.2d 1383, 1385, 70 LRRM 2899 (9th Cir. 1969). The majority incorrectly implies that it is not the right to intervene but the control actually exercised that is determinative. The law is to the contrary. *Joint Council of Teamsters No. 42* v. *NRLB*, 146 U.S.App.D.C. 275, 450 F.2d 1322, 1327, 78 LRRM 2351 (1971); *Associated Independent Owner-Operators, Inc.* v. *NRLB*, supra, 407 F.2d at 1387.

Respondent retained the power to impose a ceiling on operating expenditures, including labor costs, and

could therefore effectively control the operation of the theater, including the number and kinds of employees that could be hired. Respondent also tied Cynatron's bookeeping in with its own and reserved the right to assist Cynatron in buying and booking films. Shaw and Krutilek had no personal investment in the enterprise; they paid no money down and advanced no security for the theater equipment. They brought no previous skill or experience to the business. Their opportunity for profit was closely circumscribed by the sublease; in addition to rental payments and commission on concessions, respondent reserved an amount equal to 75 percent of the net profits.

Under the terms of the sublease, Shaw and Krutilek enjoyed only nominal entrepreneurial independence, faced no risk of loss, had only a limited opportunity for profit, and made no personal investment in the business. These facts indicate an employee and not an independent contractor relationship. See *Brown* v. *NLRB*, 462 F.2d 699, 703, 80 LRRM 2850 (9th Cir. 1972). Moreover, their lack of special experience, the fact that they were paid primarily on a weekly basis, and the fact that respondent supplied all the instrumentalities of the business also suggest they are simply employees. See Restatement of Agency 2d §220.

On this record, the Board's conclusion should be accepted and its order enforced.

Supreme Court, U.S.
FILED
SEP 15 1980
MICHAEL RODAK, JR., CLERK

80-219

In the Supreme Court of the United States

October Term, 1980

No. 80-219

BIG BEAR SUPERMARKETS No. 3,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DOMNITZ AND PROCHAZKA
A Professional Corporation
Attorneys at Law
3061 Fourth Avenue
San Diego, California 92103
(714) 299-1391
By Richard D. Prochazka
Linda M. Ford
and
GEORGE R. MURPHY
1775 K Street, N.W., Room 900
Washington, D.C. 20006
(202) 223-3111
Attorneys for Intervenor

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INTERVENOR STATUS OF LOCAL 229

Amalgamated Meat Cutters and Butcher Workmen of North America, Local 229 was the Intervenor in the action below. Pursuant to U.S. Sup. Ct. Rule 21, Local 229 is a party to these proceedings. Local 229 will hereinafter refer to itself as "Intervenor."

QUESTIONS PRESENTED

The petition for certiorari sets forth the first question presented in a manner which begs the real question. By stating that the question presented is

> "whether the inconsistent decisions of the Ninth Circuit Court of Appeals in *NLRB v. Big Bear Supermarket No. 3* and in *NLRB v. Transcontinental Theaters, Inc.*, obfuscate the law governing franchise agreements and thereby impair the right to contract,"

the Petitioner assumes that the decisions in the two cases cited are inconsistent. The real question presented by the petition is whether the decisions of the Ninth Circuit Court of Appeals in *NLRB v. Big Bear Supermarket No. 3* and *NLRB v. Transcontinental Theaters, Inc.*, are inconsistent.

In the Supreme Court of the United States

October Term, 1980

No. ——

BIG BEAR SUPERMARKETS NO. 3,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

ARGUMENT

I

The Petitioner misconstrues the Function of the Courts in Reviewing the Board's Decisions.

At the outset it is necessary to point out that the Petitioner appears to have a basic misunderstanding of the functions of both this Court and the appellate court in reviewing the decisions of the National Labor Relations Board.

The Petitioner implies that both the *Transcontinental* and *Big Bear* decisions are wrong because they hold that the provisions of a franchise agreement are relevant only insofar as they are actually exercised, thereby requiring the Court of Appeals to "step outside its purview and examine specific facts each time it reviews a franchise agreement" (Petition, Page 8). This assumes that the function of the Court of Appeals is to review franchise agreements. As this Court recognized in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the function of the courts of appeal in reviewing Board decisions and orders is to determine whether on the record as a whole there is substantial evidence to support the Board's findings. Obviously, then the Court of Appeals is not "stepping outside its purview" when it examines facts other than the franchise agreement itself in order to determine whether the Board's findings as to the nature of the relationship are supported by substantial evidence.

The Petitioner also implies that it is the function of this Court to assist prospective franchisors and franchisees in drafting their agreements by establishing "a uniform set of rules applicable to franchise agreements." This puts the Supreme Court of the United States somewhat in the position of house counsel to prospective franchisors and franchisees, charged with the responsibility of drafting their agreements for them. Imposing such a responsibility on this or any other court places an intolerable burden upon the judicial system, particularly in light of the myriad types and varieties of relationships potentially involved. In any event, as the discussion below will show, there is no present lack of uniformity resulting from the opinions of the Ninth Circuit Court of Appeals in the *Transcontinental* and *Big Bear* cases.

II

There are No Conflicts in the Two Decisions Cited Warranting the Granting of Certiorari.

The Petitioner asserts that in the *Transcontinental* and *Big Bear* cases the Ninth Circuit Court of Appeals reached opposite conclusions based on "virtually identical franchise agreements" (Page 7). This statement blatantly assumes a similarity in the two agreements which is not evident from the decisions cited and ignores the factors other than the agreements themselves which were considered by the court in each case. The Court of Appeals specifically recognized the existence of substantial differences between the facts in the two cases in the amendment to its decision in the *Big Bear* case (See Appendix, Petition at Page 36).

Again, it must be recalled that the function of the Court of Appeals in the *Transcontinental* and *Big Bear* cases was not to make a *de novo* determination of the nature of the relationship, but rather to decide if the determination previously made by the agency authorized by Congress to do so was supported by substantial evidence. For this reason the most useful method of analysis of the two decisions is to examine the factors relied upon by the Board in each case. By so doing one can ascertain what evidence the Court evaluated in reversing the Board in the *Transcontinental* case and upholding it in the *Big Bear* case. The Board's Decision in *Big Bear* is set forth herein at Appendix Page 1a. The decision in *Transcontinental* is set forth at Appendix, Page 30a.

In both cases the crucial point was whether the parties to the agreements in question had engaged in bona fide arms-length transactions. As the Board pointed out in its

decision at note 18, the application of the criterion of control over labor relations policies is premised upon the existence of such a bona fide, arms-length relationship. Thus, in both the *Transcontinental* and *Big Bear* decisions the Board first determined whether the relationship was a genuine arms-length contractual relationship. The Court of Appeals found the Board's decision holding the *Transcontinental* relationship that of an employer and employee was not supported by substantial evidence and reasonable inference. In *Big Bear* the Court did find substantial evidence and reasonable inference to find an alter ego relationship.

In each case the Board considered a number of factors, both with respect to the written agreements and to their practical application. A comparison of the factors considered clearly distinguishes the two cases and establishes that the two decisions are not in conflict.

Both the Transcontinental and Big Bear agreements provide for termination on short notice. However, there is an important difference. The Transcontinental lease could be terminated if the lessees did not operate at a profit or conduct the business in a businesslike manner (Appendix, Page 34a). The Big Bear agreement was terminable if Holmes did not request and receive approvals required by the agreement (Appendix, Page 9a). The items for which he was required to seek approval included changing product lines and purchasing advertising (Appendix, Page 9a).

The Transcontinental agreement permitted the lessor to assist Cynatron in bidding and selecting its films. There was no obligation for Cynatron to abide by Transcontinental's advice. Moreover, this right was never exercised

(Appendix, Page 47a). In contrast, Big Bear not only required Holmes to stock advertised goods at advertised prices, but also required Holmes to honor discount coupons appearing in Big Bear's purchased advertising, give trading stamps as long as the chain did so, and carry product lines customarily carried in Big Bear stores in quantities to be determined solely by Big Bear, (Appendix, Pages 8a-9a).

With respect to advertising, Member Kennedy notes that Cynatron had increased its advertising budget, indicating control over advertising (Appendix, Page 48a). In sharp contrast, Big Bear controlled and purchased the advertising for Holmes's store, permitting him to obtain additional advertising only with written permission (Appendix, Page 9a).

Although in both cases there was virtually no significant initial investment on the part of the lessees, there is a signifiicant difference in the financial dealings during the course of the relationship. Cynatron maintained its own bank accounts, books, and accounting system, although it did provide designated reports to Transcontinental so that Transcontinental could fulfill its obligation to provide such reports to the owner of the shopping center in which the theater was located (Appendix, Pages 46a, 49a). Cynatron was solely responsible for paying its own obligations, including its obligation to Transcontinental (Appendix, Page 49a). On the other hand, all of Holmes's receipts were collected and controlled by Big Bear which advanced all operating expenses and merely debited the store account (Appendix, Pages 10a-12a).

A number of factors were considered by the Board in *Big Bear* which did not exist in the *Transcontinental* case. Holmes is the son of a member of Big Bear's Board of

Directors who is also the owner of five percent of Big Bear's stock. He is afflicted with a progressive disease which was said to have interfered with his previous job as manager of one of the stores in the Big Bear chain (Appendix, Page 7a). The two Cynatron partners had no previous relationship with Transcontinental (Appendix, Page 44a). Big Bear owns the shopping center on which Holmes's store is located (Appendix, Page 6a). Transcontinental was merely a lessee of two theaters in a shopping center (Appendix, Pages 31a-33a).

Perhaps most significant of all is the fact that while the Transcontinental agreement merely gives the lessor the right to come upon the property at reasonable times to inspect to see if the theaters are being properly run and maintained (Appendix, Page 35a), the Big Bear agreement provides that Holmes will be provided with no less supervision than any other markets in the Big Bear System (none of which were franchised) (Appendix, Page 9a).

It is obvious from the Board's decisions not only that the Court of Appeals was indeed considering totally different factual situations in each case, but also that the Petitioner's assertion that the two agreements were virtually identical is false.

The Petitioner asserts that the Court of Appeals found control over labor relations a crucial issue in *Transcontinental*, but dismissed it as irrelevant in *Big Bear*. The implication is that the two decisions are, therefore, inconsistent. That is simply not the case. In *Big Bear* the Court upheld the Board's application of the law cited earlier, i.e., the court agreed that the threshold consideration is whether a bona fide arms-length transaction exists. If it does, as the Court held in the *Transcontinental* case, then

control over labor relations becomes a crucial factor. If it does not, then the relationship is a sham, the two entities are really one and therefore there is no real separation of control to be discussed. This reasoning is not only sound, it is elementary.

Finally, the Petitioner claims that the decision in *Big Bear* is contrary to a prior Ninth Circuit decision in *Sakrete of Northern California, Inc. v. NLRB*, 322 F.2d 902 (9th Cir. 1964). According to the Petitioner, the court in *Sakrete* held that the criterion of common ownership or financial control was the least important of the four single employer criteria. Here again, Petitioner distorts the Court's reasoning. The Court did not hold that common management was the least important, merely that it was the least emphasized of the four criteria:

> "A discussion of the early development of this Board principle, and of the principal factors which the Board weighs in deciding whether there is the requisite integration to constitute two corporations a 'single employer,' is set out in the 21st Annual Report of the Board, pages 14-15, where this statement appears:
>
> " 'In applying the present jurisdictional standards, the Board early reaffirmed the long-established practice of treating separate concerns which are closely related as being a single employer for the purpose of determining whether to assert jurisdiction. The question in such cases is whether the enterprises are sufficiently integrated to consider the business of both together in applying the jurisdictional standards.
>
> " 'The principal factors which the Board weighs in deciding whether sufficient integration exists include the extent of:

"'1. Interrelation of operations

"'2. Centralized control of labor relations;

"'3. Common management; and

"'4. Common ownership or financial control.

"'No one of these factors has been held to be controlling, but the Board opinions have stressed the first three factors, which go to show "operational integration," particularly centralized control of labor relations. The Board has declined in several cases to find integration merely upon the basis of common ownership or financial control.'" (Footnotes omitted.)

Moreover, it is significant that the discussion of the common management and control criterion and its relative significance in both *Transcontinental* and *Sakrete* was in the context of an analysis of single employer status for purposes of the Board's asserting jurisdiction, not as in the instant case, in the context of an allegation that the agreement was a sham intended to circumvent the original Employer's obligations under a collective bargaining agreement.

There is no conflict between the *Transcontinental* and *Big Bear* decisions. Both are sound, both are based upon the same well established principles applied to totally different facts.

Wherefore, Intervenor respectfully submits that certiorari should be denied.

Dated: September 4, 1980

DOMNITZ AND PROCHAZKA
A Professional Corporation

By: RICHARD D. PROCHAZKA

By: LINDA M. FORD

GEORGE R. MURPHY
Attorneys for Intervenor

APPENDIX

239 NLRB No. 26

JMT
D–4386
La Mesa, Calif.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

BIG BEAR SUPERMARKETS NO. 3
and Case 21–CA–15605
RETAIL CLERKS UNION, LOCAL 1222
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO
and Case 21–CA–15703
AMALGAMATED MEAT CUTTERS LOCAL
NO. 229, AMALGAMATED MEAT CUTTERS
& BUTCHER WORKMEN OF NORTH AMERICA,
AFL-CIO

DECISION AND ORDER

On February 24, 1978, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, the General Counsel and Charging Parties Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, and Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, filed exceptions and supporting briefs. Respondent and the Intervenor, Richard Holmes,[1] filed briefs in support of the Decision of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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1 Holmes, who was alleged in the complaint to be the *alter ego* of Respondent, was permitted to intervene at the hearing.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Respondent, a corporation engaged in the operation of retail grocery markets in San Diego County, California, owns and operates a chain of approximately 22 supermarkets, known as Big Bear markets, in that area. The corporate entity, designated as Big Bear Supermarkets #3, additionally owns and operates a number of other businesses.[2] Big Bear Supermarkets #3 has, since at least 1957 and 1950, respectively, been party to successive collective-bargaining agreements with Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, herein called Local 1222, and Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, herein called Local 229, covering multistore bargaining units at its retail grocery and meat markets in San Diego County.[3] Prior to November 15, 1976, Respondent applied its contracts with Local 1222 and Local 229 to bargaining unit employees covered by these contracts at all Big Bear markets in San Diego County.

Effective November 15, 1976, Respondent franchised its Big Bear store 13, located in La Mesa, California, to

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2 These include 6 other grocery stores and markets operated under the trade names of Market Place and Cooks Markets, 9 Daisy's Restaurants, and 15 Par Liquor Stores, as well as several shopping centers.

3 Respondent's contracts with Local 1222, the most recent of which is effective from July 28, 1975, to July 30, 1978, set forth the specific job classifications constituting the unit appropriate for collective bargaining. Respondent's contracts with Local 229, the most recent of which is effective from November 8, 1976, to November 4, 1979, likewise set forth the job classifications included in the appropriate bargaining unit.

Richard Holmes, the Intervenor in this proceeding. Richard Holmes, a former store manager at another of Respondent's Big Bear markets, is the son of Gerald Holmes, a corporate officer of Respondent,[4] who is a 5-percent shareholder of Big Bear Supermarkets #3. Respondent had not previously, nor has it since, franchised any other of its operations.

Under the terms of the franchise agreement executed by the parties on November 8, 1976, Richard Holmes has exclusive control over the labor relations of the La Mesa store. In preparation for taking over the store's operation, Holmes recruited and hired a new complement of employees for that store, paying them wages and benefits less than those required under Respondent's union contracts. The 12 Big Bear employees working in the La Mesa store were transferred by Respondent to other of its Big Bear markets before Holmes commenced operation of the store as franchisee. Only one former employee of store 13, a part-time janitor who was not included in the bargaining unit under either of Respondent's union contracts, was retained by Holmes at the franchised store.

The parties have stipulated that Respondent's employees at the La Mesa store were transferred to other Big Bear stores without being given the opportunity to seek continued employment at the franchised store, as we note is required by Respondent's contract with Local

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4 Gerald Holmes is Respondent's general manager and secretary-treasurer, as well as a member of the corporation's board of directors.

1222.[5] The parties have further stipulated that Respondent neither notified nor bargained with the Unions representing these employees regarding the employees' transfer either before or after the transfers occurred. The parties additionally stipulated that Richard Holmes has refused to recognize either Local 1222 or Local 229 as the bargaining representative of the employees at the franchised store, and has also refused to apply the terms of Respondent's contracts with these Unions to the employees at the La Mesa store. He has declined as well to supply Local 1222 with the names and addresses of the store's current employees in the job classifications included in its bargaining unit when such information was requested by that Union. As a result of the employee transfers and of franchisee Holmes' subsequent refusal to recognize and bargain with these Unions as representatives of the employees at store 13, or to abide by the terms of Respondent's collective-bargaining agreements with Local 1222 and Local 229, both Unions filed the instant unfair labor practice charges.

The Regional Director for Region 21 consolidated the two cases and, on June 9, 1977, issued an amended complaint alleging that the La Mesa store is an *alter ego* of Big Bear Supermarkets #3. The gravamen of the General Counsel's contention is that Respondent's purported franchising of store 13 to Richard Holmes was, in actuality, a sham transaction motivated by Respondent's desire

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5 Art. XIX(D) of Respondent's contract with Local 1222 states as follows:

D. SALE OR TRANSFER

1. In the event of a sale or transfer of a store or stores, an employee shall be allowed a seven (7) day period from the date of announcement to the employees of the sale or transfer during which time he may determine whether he wishes to stay with the seller or whether he wishes to make application for employment with the new owner or transferee. In the event the employee chooses to remain with the seller, such choice shall not be construed as any guarantee of employment over and beyond the terms of this Agreement.

to transform a losing operation into a profitable one by avoiding its obligation to pay contractually agreed to union wages and benefits. Specifically, the General Counsel alleges that Big Bear retained and exercises such extensive control over the franchised operation as to render it in effect a subordinate entity and disguised continuance of Big Bear Supermarkets #3. Thus, the complaint alleges that Respondent violated Section 8(a)(1), (3), and (5) of the Act by refusing to bargain with Local 1222 and Local 229 as representatives of the employees at the La Mesa store; by refusing to honor its collective-bargaining agreements with these Unions with regard to those same employees; by withdrawing recognition from the Unions as collective-bargaining representatives of the employees in the separate units at the La Mesa store; by unilaterally transferring the previous employees of the La Mesa store to other stores of Respondent within the multi-store bargaining units, and without bargaining with the Unions over such transfers, because of their union representation; and by refusing to furnish Local 1222 with the names and addresses of current employees of the La Mesa store in job classifications included in its bargaining unit when such information was requested by that Union.

The Administrative Law Judge, rejecting the General Counsel's *alter ego* contention, dismissed the complaint in its entirety. Analyzing the instant case in terms of whether the two enterprises have substantially identical ownership and control and common business purpose, management, operations, equipment, customers, and supervision, the Administrative Law Judge concluded that these factors did not preponderate in favor of finding Richard Holmes to be the *alter ego* of Big Bear Super-

markets #3.[6] Nor, he concluded, did the evidence establish the selection of Holmes as franchisee to be a subterfuge by which Respondent would continue to operate the store. In addition, the Administrative Law Judge found that neither the transfer of all union-represented employees at the La Mesa store to other stores in Respondent's chain nor Respondent's failure to notify and bargain with the Unions representing those employees regarding their transfer and change in status of the store violated the Act. For the reasons set forth below, we disagree with certain of these conclusions, and therefore find that Respondent committed certain of the unfair labor practices alleged.

The *Alter Ego* Issue

The La Mesa store, as indicated in the Administrative Law Judge's Decision more fully describing the facts in this proceeding, is located in a shopping center which Respondent owns. This particular shopping center has been subject to three separate freeway construction condemnation proceedings by the State of California, shrinking its size from a total of some 13 acres in 1950 to less than 2 acres in 1976. The most recent condemnation and road construction, occurring in 1975-76, resulted in an approximate 25-percent sales drop for store 13, and in the elimination of a substantial portion of the store's parking area. Profit and loss statements show that the store declined from a fiscal 1974 profit of $1,580 to a fiscal 1975 loss of $52,507 and a fiscal 1976 loss of $55,320.

It was these financial losses, along with economic difficulties at some of its other operations, which Respondent

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6 These factors have previously been identified as being generally indicative of *alter ego* status. *Crawford Door Sales Company, Inc. and Cordes Door Company, Inc.*, 226 NLRB 1144 (1976); *Marquis Printing Corporation and Mutual Lithograph Company*, 213 NLRB 394 (1974).

asserts precipitated its decision to franchise the La Mesa store. Further influencing that decision, Respondent maintains, was its desire to retain its overall market share of the grocery business in San Diego County, and the need to keep the Big Bear name in its shopping center as a customer-drawing factor for the benefiit of its tenants in other stores and shops in the center. Thus, Respondent claims, the franchising of the store was a bona fide, arm's-length business transaction motivated by a desire to minimize its financial losses while achieving these related business objectives.

Selected by Respondent as franchisee was Richard Holmes, an employee of Big Bear Supermarkets #3 since 1969. The son of Gerald Holmes, a major officer and a shareholder of Respondent,[7] Richard Holmes was until November 1976 manager of a high volume Big Bear market in El Cajon. His ability to continue in that capacity was, unfortunately, limited by the fact that he is a victim of multiple sclerosis. The effects of this disease had necessitated his taking a leave of absence of about 4 months in 1975, and Holmes testified that the disease was affecting his ability to perform as a Big Bear manager in 1976. Rated by the Veterans Administration as 30-percent disabled, Holmes testified that multiple sclerosis is generally a progressive disease, depending upon the person and the kind of pressure he is under. Holmes has been aided in the operation of the franchised store by his wife and mother, who have worked at the store without pay.

The franchise agreement executed by the two parties was, according to Respondent's attorney who prepared the

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7 Approximately 80 percent of the stock of Big Bear Supermarkets #3 is owned by its president, John Mabee, with Gerald Holmes owning about 5 percent, and the remaining 15 percent being held primarily by supervisors of Respondent.

document, patterned after a 1966 copy of a Southland Corporation franchise agreement for a 7-Eleven store which the Board had found to create an independent contractor relationship between a franchisor and its franchisee.[8] While identifying several areas in which modifications to that document were made, including rent, advertising, termination, and inventory, Respondent avers that it basically merely incorporated the provisions of Southland's agreement in drafting Big Bear's franchise and leasing agreements.[9] (Major provisions of the Big Bear agreement are set forth verbatim in the attached Decision of the Administrative Law Judge.)

As a review of this agreement reveals, Big Bear retains under the contract terms a substantial number of controls over the operation of the La Mesa store. Thus, the agreement provides, for example, that (1) the La Mesa store is to be operated as part of Respondent's system of Big Bear stores; (2) Holmes is specifically obligated to carry such product lines as are customarily carried in the Big

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8 *The Southland Corporation, d/b/a Speedee 7-Eleven*, 170 NLRB 1332 (1968).

9 While we do not find it necessary to our decision herein to engage in an extensive comparison and analysis of the Big Bear and Southland Corporation agreements, we note significant variations between the two. Southland franchisees, for example, are required to pay a cash initial franchise fee at contract execution, as well as provide cash operational capital as an initial investment. They are also charged interest on open account items advanced by Southland, if they desire to finance their operation through Southland rather than from some other source. Big Bear, as discussed *infra*, has markedly different provisions regarding these items. (Any thorough and accurate comparison of Big Bear's contract with the Southland agreement, asserted by Respondent to have been its model, is precluded, however, by the fact that Respondent introduced into evidence only a copy of a Southland agreement dated July 1977, and the 1966 version claimed as the prototype for Big Bear's franchising contract was not made available as record evidence.) In any event, given the overall facts of this case, we do not find the situation of the Southland Corporation, which is an acknowledged entity in the franchising industry, to be analogous to that of Big Bear, which is not in the business of franchising and, indeed, aside from the La Mesa store has made no attempt to franchise its business units.

Bear system, and in such quantities as are reasonably necessary, *in the sole judgment of Big Bear*, to meet customer demands; (3) Holmes must obtain permission from Big Bear before changing any product line customarily carried in the Big Bear system; (4) Big Bear has the authority to contract for such advertising as it deems sufficient *in its sole judgment* and, while Holmes may purchase such additional advertising as he may desire, that advertising must be approved in writing by Big Bear and may not, *in the sole judgment of Big Bear*, be inconsistent with its advertising purposes; (5) Holmes must stock and sell advertised goods at the advertised prices and honor discount coupons contained in Big Bear advertisements; (6) Holmes is obligated to purchase and distribute trading stamps for so long as Big Bear gives them; and (7) Big Bear reserves the right to provide Holmes with supervision and technical assistance, and *in any event with no less supervision than is provided to other markets in the Big Bear system.* Holmes is moreover precluded from assigning, encumbering, mortgaging, pledging, or hypothecating his interest in the leasehold estate or equipment (although Big Bear's right to take the same actions with regard to the store's equipment and fixtures is retained), and from selling, transferring, or assigning his interest in the contract as well. A termination clause provides that Holmes may lose his franchise if he fails to request and receive any approvals required by the agreement, among several listed conditions justifying termination. Thus, the franchised store continues to operate essentially as any other Big Bear market, with Big Bear actively exercising its contractual prerogatives.

Also of import, particularly since Respondent asserts that the franchising resulted from valid economic considerations, are the financial provisions underpinning the

franchising agreement. For a downpayment of $2,000 and the execution of an unsecured promissory note in the amount of $114,400.81, Holmes took over a $116,400.81 inventory of goods and became the putative owner of this ongoing business operation having an annual sales volume well in excess of $1 million.[10] According to article 19 of the agreement, outlining the operation of the owner's open account, Big Bear pays for all expenditures required to be made in the operation of the business, and debits these to Holmes' open account. There is no requirement for the payment of interest on this account; therefore, Big Bear in actuality advances interest-free all moneys required for the store's operation – including so-called owner's investment costs of permits, transfer fees, business licenses, and "set up" fees.[11] Big Bear then collects and deposits Holmes' daily sales receipts, credits this income to Holmes' open account, and by virtue of the accounting services which it also provides determines the quarterly and, finally, yearly net operating income for apportionment between it and Holmes. As consideration for the lease, franchise, license agreement, utilities, and services to be performed by Big Bear, the agreement requires that Big Bear be paid a "Big Bear Charge" consisting of 40 percent of Holmes' net operating income.[12]

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10 The value of "goodwill" accruing to the new owner in his assumption of the business is not financially recognized in this document. In marked contrast, the purchase prices of two stores recently sold by Respondent included amounts of $40,000 and $100,000, respectively, over and above the value of inventory transferred.

11 Art. 18 of the agreement, which is not among those provisions included in the Administrative Law Judge's Decision, states as follows:

> 18. OWNER'S INVESTMENT.
> OWNER shall pay for all permits, transfer fees, business licenses, or any other "set-up" fees that may be necessary to take over the store and operate it. In addition, OWNER agrees to pay to BIG BEAR the cost of opening inventory as is provided in paragraph 17 above. These amounts shall constitute the OWNER'S investment. These costs shall be debited to OWNER'S Open Account as provided above.

12 Net operating income is defined as "gross gain less operating expenses."

Interspersed throughout the agreement are provisions whereby Big Bear commits itself to pay various items to be borne by Holmes under the contract's terms, debiting these payments to Holmes' noninterest-bearing open account. Thus, Big Bear obligates itself to pay all bills, invoices, or other obligations Holmes is required to pay under the maintenance and repair provisions for the leased premises and equipment; the rent itself for the building and fixtures is debited to the open account (since Big Bear owns the leased building and fixtures, it is in effect advancing the economic costs of these items by debiting Holmes' account); Big Bear agrees to advance Holmes sufficient sums to obtain all permits and licenses required by law for the store's operation; Big Bear agrees initially to arrange for fire and casualty insurance, debiting its cost to the open account; Big Bear is required, in addition to paying real property taxes under the agreement, to make the actual tax payments for Holmes' personal property taxes on the inventory and equipment, as well as the businesses' sales taxes, again debiting the open account; Holmes' pro rata share of the advertising and supervision Big Bear provides is to be debited to the account; Big Bear is obligated to pay and debit to his open account Holmes' state unemployment insurance, social security, payroll insurance, workmen's compensation insurance, and any other similar expenses relative to Holmes' employment relationship. As is apparent from all of the above, it is Big Bear and not Holmes providing the capital to operate the La Mesa store. Holmes would moreover appear under the agreement's terms to have no choice of obtaining his financing from any other source, a fact which we note without comment other than the observation that he would not appear likely to desire other financing with Big Bear financing the store's operation

interest free. It is, of course, relevant to a consideration of the alleged bona fide nature of the franchising transaction.

Holmes' unsecured $114,400.81 promissory note in payment for the store's initial inventory is payable $500 or more monthly, including interest at the rate of 5 percent per annum, until the note has been paid in full. At the end of each quarterly accounting, Holmes is required to make a principal payment on this note in an amount equal to 50 percent of his net profit until the cost of the initial inventory has been paid in full. There is no time limit as to when this principal amount must be fully paid. The Administrative Law Judge found it significant that Holmes had applied his total net profits, rather than only the half required by the contract, to the repayment of the principal on this note, as indicative that Holmes is truly a franchisee and the agreement is not a sham. A review of the record, however, indicates that the Administrative Law Judge was factually in error in this regard. Whereas Holmes did apply his total quarterly profits to payment of the principal on January 13 and April 20, 1977, on July 31, 1977, he paid on the note's principal only the half of his net profits mandated by the contract. Thus, whatever weight the Administrative Law Judge accorded this fact in reaching his conclusion would appear misplaced.

Another significant financial aspect of the transaction is reflected in article 21 of the agreement, relating to Holmes' "Draw on Anticipated Profits." This provision requires Big Bear to pay Holmes $425 each week, irrespective of whether or not the business is showing a profit. Moreover, the amount may be changed only upon the written request of Holmes and with Big Bear's approval, and may not be reduced either quarterly or at the

close of the fiscal year for lack of a profit. This amount, roughly comparable to the $18,500 to $23,000 annual salaries received by managers of Respondent's Big Bear markets, is also to be debited to Holmes' interest-free open account. Although the agreement refers to this payment as a "Draw on Anticipated Profits," the payment is totally unrestricted under the contract terms by any necessity of ever having any profits to draw on.[13] It would appear, rather, to operate as an open-ended salary guarantee with Big Bear again advancing these funds interest free.

Big Bear, as stated, avers that it entered into the franchising agreement in order to cut its financial losses at the La Mesa store.[14] The agreement does not, however, as described above, function to relieve Big Bear of an unprofitable operation. Richard Holmes paid Big Bear only $2,000 and his unsecured promissory note, the principal of which is essentially to be amortized from future profits, if any, of the store, for the Big Bear franchise. As a result of this transaction, Big Bear gained only $2,000 and a promise from Richard Holmes to pay for the other $114,400.81 worth of inventory provided him at some time in the future when the store makes money. Although the agreement requires Holmes to share in any losses of the store, if his open account reflects a balance due upon the termination of the agreement, the record contains no evidence that Holmes owns assets accessible for such

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13 The 1977 Southland agreement, in comparison, likewise provides for an owner's draw on anticipated profits, but reduces that draw if the draw plus the payroll for the store exceeds a stated percentage of net sales.

14 While Respondent's other asserted reasons for the franchising of the store; i.e., the desire to maintain its overall market share of the grocery business in San Diego County and to keep Big Bear in the shopping center as a customer-drawing factor, may explain why Respondent did not want to sell the store, they would appear to bear no logical relationship to how franchising could resolve this store's financial difficulties.

purpose. It does indicate, however, that he has pledged no other assets as security. Meanwhile, under the agreement Big Bear is committed to continue its general financing of the store's operation, by virtue of various provisions requiring it to pay all the bills, and the fact that Holmes pays no interest on these moneys advanced. Thus, any true entrepreneurial risks would appear to be borne in the first instance by Big Bear, rather than by Holmes.

Furthermore, franchising could not solve the major reason adduced by Respondent for the store's poor financial record. Big Bear President John Mabee testified that the store's volume had been "headed on a straight line up, and all of a sudden with the taking of the parking lot it leveled off and flattened – dropped and has sort of maintained a level line since that particular time," referring to the 1974 state condemnation and 1975-76 freeway construction at the store's locale which resulted in about a 25-percent drop in its sales volume. Franchising coluld hardly remedy a lack of parking space. Nor does the record contain any evidence that Holmes overcame this problem.

What was accomplished through the purported franchising, however, was a drastic reduction in the store's operating costs through avoidance of the application of Respondent's union contracts to the franchised store's employees. Thus, an examination of profit and loss statements for the store shows, for example, that whereas salaries and wages cost Big Bear $174,204, and employee benefits an additional $24,537 for the period from August 1, 1975, to July 31, 1976, Holmes has operated the franchised store from November 15, 1976, to July 31, 1977, at a salary and wage cost of $81,687, with employee benefits

costing only $1,988. While these figures do not, of course, represent equivalent time periods, they are indicative of drastically reduced costs in this area, with approximately the same number of employees working at the store during both time periods.[15] Operating the store in essentially the same manner as it had previously functioned under Big Bear, Holmes has succeeded through these operating cost reductions in transforming the store from a losing operation to one which earned a net operating income in excess of $30,000 for the first 8½ months of its fiscal year, as reflected in the instant record.

We agree with the General Counsel that the foregoing shows that Respondent's real purpose behind the entire arrangement was to retain for itself control of the La Mesa operation while, through the appearance of a bona fide franchise agreement, achieving a reduction in labor costs through the avoidance of the economic obligations imposed by its collective-bargaining agreements with Local 1222 and Local 229. Further evidence that Big Bear's real objective was simply to oust the Unions from its La Mesa store is, as the General Counsel argues, found in the manner in which it rid that store of those employees which had been represented by the Unions. Thus, those employees were given no option to continue at La Mesa but were, without any consideration apparently being given to their choice in the matter, transferred to other Big Bear stores. This was done with respect to employees represented by Local 1222 despite that Union's contract with Big Bear requiring, as noted above, that in the event of a store's transfer or sale an employee be given 7 days to choose between applying for a job with

15 The parties have stipulated that prior to November 15, 1976, there were 12 employees at the store, and that the number of employees of Holmes at the store after that date was 13. At the time of the hearing, Holmes testified, the store had 16 employees.

the new owner or moving to another of Respondent's stores.[16] Such preemptory transferring out ostensibly would obviate the possibility that Holmes would be a successor employer obliged, despite even a bona fide franchising, to recognize and bargain with the Unions.

Therefore, in view of all the foregoing, including, *inter alia*, the selection of Richard Holmes, a close relative of high management, as the purported franchisee; the controls retained and exercised by Big Bear over the store's operation; and the economic realities of the arrangement reflected in the franchise agreement whereby Holmes initially invested only $2,000 cash and Big Bear finances the store's operation without charging interest to Holmes, we conclude, contrary to the Administrative Law Judge, that the arrangement between Big Bear and Holmes was not a bona fide franchising transaction, but rather that Holmes' position was essentially that of a manager of,[17] and that he was in fact Respondent's *alter ego* with respect to, the La Mesa store.[18] Accordingly, we find that Richard Holmes and Respondent constitute a single employer within the meaning of Section 2(2) of the Act, and that employees of the La Mesa store are employees of Respondent and part of the bargaining units covered

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16 See fn. 5, *supra.*

17 As noted above Holmes' "guaranteed" minimum income under the "franchising" arrangement was substantially the same as that earned by managers of Respondent's other stores.

18 The record indicates that control over labor relations with the new La Mesa store employees existed essentially in Richard Holmes. While we have regarded the control which one party exercises over the labor relations policy of another to be an important factor in deciding whether a franchisee is an independent contractor or a single or joint employer with it franchisor, our application of that criterion has been premised upon the existence of a bona fide, arm's-length franchising relationship between the contracting parties. See *The Southland Corporation, d/b/a Speedee 7-Eleven, supra.* Here, based upon a consideration of all the factors present in this case, we cannot, as concluded above, find that Richard Holmes and Big Bear entered into such a bona fide, arm's-length franchising relationship.

by Respondent's collective-bargaining agreements with Local 1222 and Local 229.

Therefore, by withdrawing recognition from and refusing to recognize Local 1222 and Local 229 as the collective-bargaining representatives of the employees in the separate units at the La Mesa store on and after November 15, 1976, and by refusing at such times to apply the terms of the collective-bargaining agreements to such employees, thereby unilaterally changing the terms and the conditions of employment specified in the applicable collective-bargaining agreements, Respondent violated Section 8(a)(5) and (1) of the Act. Respondent additionally violated Section 8(a)(5) and (1) of the Act by refusing to furnish information to Local 1222 when that Union requested names and addresses of its bargaining unit employees at the La Mesa store from Respondent's *alter ego,* Richard Holmes. Finally, by transferring employees at the La Mesa store to other stores because of their representation by Local 1222 and Local 229, Respondent violated Section 8(a)(3) and (1) of the Act as well.[19]

Conclusions of Law

1. Respondent Big Bear Supermarkets #3 and its *alter ego,* Richard Holmes, constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Richard Holmes is the *alter ego* of Big Bear Supermarkets #3 in the operation of Respondent's Big Bear store 13, located in La Mesa, California.

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19 Inasmuch as we have found that Big Bear Supermarkets #3 and Richard Holmes are a single employer, and Respondent's union contracts provide for employee transfers between stores within the multistore bargaining units without prior consultation with the Unions, we do not find the transfers violated Sec. 8(a)(5) of the Act.

3. Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, and Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

4. All employees of Respondent Big Bear Supermarkets #3 and its *alter ego*, Richard Holmes, in a unit of all hourly employees working in the job classifications enumerated in its collective-bargaining agreement with Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, effective from July 28, 1975, to July 30, 1978, at its retail grocery and meat markets in San Diego County, including the La Mesa store, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[20]

5. Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, is now, and at all times material herein has been, the exclusive bargaining representative of all the employees of Respondent Big Bear Supermarkets #3 and its *alter ego*, Richard Holmes, in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. All employees of Respondent Big Bear Supermarkets #3 and its *alter ego*, Richrd Holmes, in a unit of all hourly employees working in the job classifications enumerated in its collective-bargaining agreement with Amalgamated Meat Cutters Local 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, effective from November 8, 1976, to Novem-

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20 We have adopted herein the description of the appropriate unit for collective bargaining as described in the amended complaint and stipulated to by the parties in this proceeding.

ber 4, 1979, at its retail grocery and meat markets in San Diego County, including the La Mesa store, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[21]

7. Amalgamated Meat Cutters Local 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, is now, and at all times material herein has been, the exclusive bargaining representative of all the employees of Respondent Big Bear Supermarkets #3 and its *alter ego*, Richard Holmes, in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

8. By refusing since on or about November 15, 1976, to bargain collectively with the Unions as the exclusive bargaining representatives of the employees in the aforesaid separate units, by withdrawing recognition from and refusing to recognize Local 1222 and Local 229 as the exclusive bargaining representatives of the employees in the separate units at the La Mesa store, by refusing to apply the collective-bargaining agreements with these Unions to such unit employees, thereby unilaterally changing the terms and conditions of employment established by its collective-bargaining agreements, and by refusing to furnish Local 1222 with the names and addresses of bargaining unit employees at the La Mesa store when such information was requested by that Union, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

9. By transferring employees of the La Mesa store to other stores within said multistore units because of their union representation at the La Mesa store, Respondent

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21 See fn. 20, *supra*.

has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, we shall order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As we have found that Respondent unlawfully withdrew recognition from and refused to recognize and bargain with Local 1222 and Local 229 as the exclusive representatives of the La Mesa store employees in their respective bargaining units, we shall order Respondent to recognize and bargain with the Unions as the representatives of Respondent's employees in those units at the La Mesa store. Having also found that Respondent unlawfully refused to apply the collective-bargaining agreements with these Unions to the unit employees at the La Mesa store, thereby unilaterally changing the terms and conditions of employment specified in its collective-bargaining agreements, we shall also order Respondent to restore the *status quo ante* by applying the terms and conditions of the current collective-bargaining agreements with these Unions to the La Mesa store employees, retroactive to November 15, 1976, and to make the La Mesa store employees whole for any losses suffered as a result of Respondent's failure to apply the collective-bargaining agreements to them, with interest to be computed in the

manner prescribed in *Florida Steel Corporation*, 231 NLRB No. 117 (1977).[22]

We shall also order Respondent to supply Local 1222 with the names and addresses of its La Mesa store bargaining unit employees, as requested by that Union, as well. Furthermore, as we have found that Respondent discriminately transferred La Mesa store employees to other stores within the multistore bargaining units because of their union representation, we shall order Respondent to offer the employees who were transferred out of the La Mesa store immediate reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, displacing if necessary any employees assigned to these positions since November 15, 1976, without prejudice to their seniority or other rights and privileges, and to make whole the transferred employees or any other unit employees[23] for any losses they may have suffered as a result of the unlawful transfers. All such losses are to be reimbursed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed as prescribed in *Florida Steel Corporation, supra.*

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22 See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

23 Local 1222 has asserted that the transfer of the La Mesa store employees to other stores within the multistore bargaining unit resulted in layoffs and reductions in hours of unit employees at these other stores. The Administrative Law Judge, while noting this general assertion, found insufficient record evidence to support such a finding. Inasmuch as we have found Respondent's transfer of union-represented employees from the La Mesa store to be unlawful, any unit employees at other Big Bear stores of Respondent within the bargaining units represented by either Local 1222 or Local 229 who in fact suffered losses as a result of Respondent's unlawful conduct are entitled to be made whole for such losses. Whether or not such losses occurred, or their extent, is a matter which can properly be resolved at the compliance stage of this proceeding. We shall, however, include in our Order herein a provision requiring that the Notice to Employees be posted at all Big Bear stores of Respondent in the bargaining units, in order that any unit employees who may have suffered losses as a result of Respondent's unlawful employee transfers may thereby be apprised of their right to be made whole.

Finally, inasmuch as Respondent's unlawful conduct was for the purpose of avoiding and evading its collective-bargaining obligations, we regard such conduct as antithetical to the entire collective-bargaining process and, thus, to a primary policy of the Act. Accordingly, we shall order that Respondent cease and desist from in any other manner infringing upon the rights guaranteed to its employees by Section 7 of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Big Bear Supermarkets #3 and its *alter ego*, Richard Holmes, La Mesa, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Retail Clerks Union, Local 1222, Retail Clerks International Union, AFL-CIO, and Amalgamated Meat Cutters Local 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, herein referred to as Local 1222 and Local 229, respectively, as the exclusive bargaining representatives of the employees in the units set forth in their respective collective-bargaining agreements with Respondent, including the unit employees at the La Mesa store, by withdrawing recognition from and refusing to recognize those Unions as the exclusive bargaining representatives of the employees in the separate units at the La Mesa store.

(b) Unilaterally changing the terms and conditions of employment established by its collective-bargaining

agreements with the aforesaid Unions by refusing to apply the terms of collective-bargaining agreements with those Unions to its employees in the separate units at the La Mesa store.

(c) Refusing to furnish to Local 1222 the names and addresses of employees included in its bargaining unit at the La Mesa store as requested by that Union.

(d) Transferring employees of the La Mesa store to other stores within the multistore units because they are represented by the Unions.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and bargain collectively with Local 1222 as the exclusive representative of the employees of Respondent at the La Mesa store in a unit of all hourly employees working in the job classifications enumerated in its collective-bargaining agreement with that Union, effective from July 28, 1975, to July 30, 1978, at its retail grocery and meat markets in San Diego County, and apply the collective-bargaining agreement with the Union to the unit employees at the La Mesa store, retroactive to November 15, 1976.

(b) Recognize and bargain collectively with Local 229 as the exclusive representative of the employees of Respondent at the La Mesa store in a unit of all hourly employees working in the job classifications enumerated in its collective-bargaining agreement with that Union,

effective from November 8, 1976, to November 4, 1979, at its retail grocery and meat markets in San Diego County, and apply the collective-bargaining agreement with the Union to the unit employees at the La Mesa store, retroactive to November 15, 1976.

(c) Make the employees at the La Mesa store in the aforesaid units whole for any losses they may have suffered since November 15, 1976, as a result of Respondent's failure to apply to collective-bargaining agreements to them, in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Supply Local 1222 with the names and addresses of employees included in its bargaining unit at the La Mesa store, as requested by it.

(e) Offer employees of the La Mesa store who were transferred to other stores of Respondent within the multistore bargaining units immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, displacing if necessary any employees assigned to those positions since November 15, 1976, without prejudice to their seniority or other rights and privileges, and make whole the transferred employees or any other unit employees for any losses they may have suffered as a result of Respondent's unlawful transfers in the manner set forth in the section of this Decision entitled "The Remedy."

(f) Preserve and, upon request, make available to the Board or its agents, for examination or copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at all its Big Bear Supermarkets in San Diego County, California, copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms provided by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the amended complaint herein be, and it hereby is, dismissed insofar as it alleges unfair labor practices not found herein.

Dated, Washington, D.C. November 1, 1978

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

24 In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board having found, after a hearing at which all parties were given an opportunity to present evidence and argument, that we violated the National Labor Relations Act, we notify you that:

WE WILL NOT refuse to bargain collectively with Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, and Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, as the exclusive bargaining representatives of our employees in the units set forth in our collective-bargaining agreements with these Unions, including the unit employees at the La Mesa store.

WE WILL NOT unilaterally change wages, working conditions, or terms of employment established by our collective-bargaining agreements with these Unions by refusing to apply the terms of our collective-bargaining agreements to our employees in the separate units at the La Mesa store.

WE WILL NOT refuse to furnish Local 1222 with the names and addresses of employees included in its bargaining unit at the La Mesa store.

WE WILL NOT transfer employees of the La Mesa store to other Big Bear markets because of their union representation.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL recognize and bargain collectively with Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, as the exclusive representative of the employees at the La Mesa store in a unit of all hourly employees working in the job classfications enumerated in our collective-bargaining agreement with that Union, effective from July 28, 1975, to July 30, 1978, at our retail grocery and meat markets in San Diego County, and will apply the collective-bargaining agreement with the Union to the unit employees at the La Mesa store, retroactive to November 15, 1976.

WE WILL recognize and bargain collectively with Amalgamated Meat Cutters Local No. 229, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, as the exclusive representative of the employees at the La Mesa store in a unit of all hourly employees working in the job classifications enumerated in our collective-bargaining agreement with that Union, effective from November 8, 1976, to November 4, 1979, at our retail grocery and meat markets in San Diego County, and will apply the collective-bargaining agreement with the Union to the unit employees at the La Mesa store, retroactive to November 15, 1976.

WE WILL make the employees at the La Mesa store in the aforesaid units whole for any losses they may have suffered since November 15, 1976, as a result of our not applying the collective-bargaining agreements to them, with interest.

WE WILL supply Local 1222 with the names and addresses of employees included in its bargaining unit at the La Mesa store, as requested by it.

WE WILL offer employees of the La Mesa store whom we transferred to other Big Bear markets because of their union representation immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, displacing if necessary any employees assigned to those positions since November 15, 1976, without prejudice to their seniority or other rights and privileges.

WE WILL make whole the employees we transferred from the La Mesa store, and any other bargaining unit employees at the stores they were transferred to who may have been laid off or had their hours of work reduced, for any losses they may have suffered as a result of our transferring the union-represented employees from the La Mesa store, with interest.

BIG BEAR SUPERMARKETS #3
(Employer)

Dated.....

By.....
(Representative) (Title)

RICHARD HOLMES
(Employer)

Dated.....

By.....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, City National Bank Building, 24th Floor, 606 South Olive Street, Los Angeles, California 90014, Telephone 213-688-5229.

TRANSCONTINENTAL THEATERS —

Decision of NLRB

TRANSCONTINENTAL THEATERS, INC.; DOUGLAS KRUTILEK AND ROBERT SHAW, A PARTNERSHIP d/b/a CYNATRON ENTERPRISES, Fremont, Calif. and INTERNATIONAL ASSOCIATION OF THEATRICAL AND STAGE EMPLOYEES, LOCAL 169 and SERVICE EMPLOYEES INTERNATIONAL UNION, THEATER JANITORS UNION, LOCAL 121, Case Nos. 20-CA-8801, and -8886, March 17, 1975, 216 NLRB No. 187

Bernard T. Hopkins, for General Counsel; George King (Boornazian, King & Schulze), for Transcontinental Theaters; James C. Snell (Broun, Norris, King, Graaskamp & Snell), for Cynatron Enterprises; Michael B. Roger (Levy, Van Bourg & Hackler), for unions; Administrative Law Judge Jerrold H. Shapiro.

Before Fanning, Jenkins, and Kennedy, Members.

EMPLOYER Sec. 2(2)

— Lease arrangement — Sole employer ►44.114

Corporation that leased movie theater to partnership was sole employer of theater's employees, there being no evidence that partnership was sole employer of employees, or that corporation and partnership were joint employers. (1) "Lease" to partnership was merely business arrangement by which corporation sought to place operation in more profitable position, through reduction of labor costs; (2) corporation retained control over theater's operations and partnership's labor relations policies, no money considerations were involved in "lease"

arrangement, and corporation was to benefit from whatever profits might result from arrangement; (3) individuals who comprised partnership were employees of corporation, or at best its agents or managers.

DISCRIMINATION Sec. 8(a)(3) REFUSAL TO BARGAIN Sec. 8(a)(5)

— Discharges — Unilateral action ► 52.241 ► 54.651

Corporation that retained control over movie theater following its "lease" of theater to partnership, violated Section 8(a)(3) of LMRA when partnership terminated two projectionists and two janitors because of their rates of pay, which are determined by their union membership, where corporation was sole employer of theater's employees. Corporation also violated Section 8(a)(5) of Act when, without notice to unions which had collective bargaining contracts with corporation covering theater's employees, it unilaterally changed employees' terms and conditions of employment.

(*Text*) The facts, may be summarized as follows: Respondent Transcontinental Theaters, Inc., herein called Transcontinental, is engaged in the operation of motion picture theaters in various States, including California. It operates eight theaters in the San Francisco Bay area. The theater in issue in this proceeding is the twin-screened theater in Fremont, near San Francisco, known as Showcase Cinemas I and II.

International Association of Theatrical and Stage Employees, Local 169, herein called Local 169, and Respondent Transcontinental are parties to a collective-bargaining agreement covering this theater, as well as its other

theaters, running from August 15, 1972, to August 14, 1976. Pursuant to that agreement Local 169 furnishes the Fremont theater two projectionists: the chief projectionist who works 35 hours per week, and a relief projectionist who works a total of 18 hours. Service Employees International Union, Theater Janitors Union Local 121, herein called Local 121, has a similar contract with Respondent Transcontinental which provides that it employ two janitors who collectively work a total of 42 hours a week. Local 121's agreement with Respondent Transcontinental has a term which runs from February 15, 1973, to February 14, 1976.

The record shows that the Fremont theater since its opening in early 1971 operated at a loss which in fiscal 1973 grew to $46,182. The largest single operating expenses were the theater's labor costs or house salaries. Because of these losses Respondent Transcontinental decided to sublease the theater and had discussions, beginning around October 20, 1973, with two individuals, Shaw and Krutilek, to take over its operations and run the business as a partnership pursuant to a sublease with Transcontinental Theaters, Inc. Shaw and Krutilek were licensed as a partnership on November 14, 1973, to do business under the name of Cynatron Enterprises, herein called Cynatron. No capital was invested and no deposit on theater equipment was required. The record indicates that a consideration in giving the sublease to Cynatron was the representation by Krutilek that the partnership was capable of running the theater with lower labor costs, and that the partners were capable of working as projectionists.

Respondent Transcontinental, by letter dated November 7, outlined the conditions and terms under which

Cynatron would operate the Fremont theater. Cynatron accepted Transcontinental's terms by the signatures of Krutilek and Shaw on November 12. On the same day Respondent Transcontinental, by letters dated November 12, 1973, advised Local 169 and Local 121 that the Fremont theater had been leased to Cynatron effective November 28, and indicated that such notice was being made pursuant to contract provisions in the collective-bargaining agreements covering termination of employees. The letters of November 12 constituted the first and only notice the Unions had of Transcontinental's decision to lease the Fremont location to Cynatron.

On November 26, 1973, Respondent Transcontinental executed the sublease agreement and on November 28, as scheduled Cynatron took over the operation of the Fremont theater. On the same day the two projectionists and two janitors covered by the Union's collective-bargaining contracts with Transcontinental were terminated.

The Unions made no effort to communicate with Transcontinental between November 12, the date of the above notification, and November 28. There was communication between the Unions and Cynatron. The Unions took the position with Cynatron that Transcontinental still owned the theater and was responsible for implementation of the terms and conditions of employment as reflected in the outstanding collective-bargaining agreements, and that Transcontinental and Cynatron were not separate legal entities, but partners in the operation of the theater and bound by the existing contracts. Cynatron rejected the Unions' contentions. Pickets from both Unions appeared November 29, 1973, and were still engaged in picketing the theater the day of the trial.

A key operative fact in this case is the formal sublease entered into by the Respondents on November 26, 1973, and the provisions included therein. The Respondents rely upon the sublease in question to show that Cynatron Enterprises thereafter became the employer. The Unions rely upon the subleases to support its contention that Transcontinental had not legally divested itself from operating and controlling the Fremont theater.[1]

The term of the sublease was for one year, November 28, 1973, through November 26, 1974, with renewal provisions. Its approximately 40 numbered sections contain the standard provisions usually found in a sublease agreement, plus the following, in an attached Exhibit A, indicating a special relationship between the parties:

Section 33 provides that Transcontinental could terminate the sublease upon seven days' notice to Cynatron if, in Transcontinental's judgment, Cynatron was not operating the theater in a proper and businesslike manner or was not producing sufficient income.

Section 34 required that Cynatron pay to Transcontinental $3,400 rent per month; five percent of the box office admissions and receipts over and above the monthly rental; and five percent of the gross receipts from the sale of merchandise, food, and drinks; and, as additional rental, Cynatron had to pay to Transcontinental every four or five weeks an amount equal to 75 percent of the net profits as determined by Transcontinental.

Section 35 required a ceiling on the weekly salaries that Krutilek and Shaw could draw, and the amount was required to be considered as operating expenses.

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1 A preexisting lease remained in existence between Fremont Meadows, Inc., owner of the shopping center where the theater is located, as lessor, and Transcontinental as lessee.

Section 36 reserved to Transcontinental the power to assist Cynatron in buying and booking films and determining the programming until Cynatron acquired the experience to do this on its own.

Other sections of the sublease provided that Transcontinental would determine the forms on which Cynatron maintained its daily reports; Transcontinental had the right to enter the theater at all reasonable times to determine whether it was being properly maintained and run; in the event that Cynatron did not promptly pay all obligations incurred in the operation of the theater, Transcontinental had the right to terminate the sublease.

The sublease became effective on November 28, 1974. Cynatron has hired eight employees since its operation began, but no projectionists. Krutilek and Shaw operate the projectors and each draw $200 a week in salary. They retain a part-time janitorial service at $120 a week. Contrary to Transcontinental's situation, Cynatron's major expense is film rental, rather than labor costs, because of the considerable wage savings it has effected in the cost of projection and janitorial labor.

The Administrative Law Judge concluded essentially on the basis of the above factors that Transcontinental and Cynatron were not joint employers, and that Cynatron was the sole employer at the Fremont theater. In reaching this conclusion the Administrative Law Judge placed major emphasis on his finding that Transcontinental "neither exercises actual, nor possesses potential, control over the Theater's labor relations under the sublease agreement or otherwise." Additionally, he found that Cynatron does not meet the Board's applicable jurisdictional standard, he recommended that those portions of

the consolidated complaint which alleged that Cynatron violated the Act be dismissed in their entirety.

As for the allegations involving Transcontinental, the Administrative Law Judge found no basis for concluding that, in subleasing the theater to Cynatron, Transcontinental was unlawfully motivated. He found that the transaction was based upon business considerations lacking in union animus. Accordingly, he recommended that the portions of the consolidated complaint which alleged that Transcontinental violated Section 8(a)(3) and (1) of the Act by subleasing the Fremont theater, which resulted in the termination of employees represented by Unions, be dismissed.

As for the allegation that Transcontinental violated Section 8(a)(5) and (1) of the Act by not giving the Union "prior notice and a prior opportunity to bargain about the decision to cease operating the Theater and the effects of that decision." the Administrative Law Judge found that the Unions had in effect slept on their rights by never testing Transcontinental's willingness to satisfy its bargaining obligation in this respect. He rejected the Unions' position that Transcontinental continued to operate the theater and the Unions' contracts continued to apply to the operation. He, therefore, recommended dismissal of that portion of the consolidated complaint alleging that Respondent Transcontinental refused to bargain regarding the changed method in operating the Fremont theater.

Contrary to the Administrative Law Judge, we are unable to conclude that Krutilek and Shaw, doing business as Cynatron Enterprises, are independent employers whose business relationships are divorced from Transcontinental.

In our opinion the conclusion is inescapable that the sublease allows Transcontinental to maintain close and substantial control over Cynatron's day-to-day operations, and permits Krutilek and Shaw little leeway to assume the role of entrepreneurs. We find significant that in subleasing the Fremont theater the so-called partners were required to pay no money or put up any deposit on the equipment. We note that the sublease closely circumscribes how much profit Cynatron is permitted to make by providing that Transcontinental, in addition to rental payments and commissions on sales of candy and refreshments, shall receive every four or five weeks an amount equal to 75 percent of the net profits unilaterally determined by Transcontinental. Moreover, Transcontinental under the sublease provides the forms on which Cynatron must maintain its daily reports, which ties Cynatron's bookkeeping in with its own, and also reserves the right to assist Cynatron in buying and booking films and determining programs. In short, Transcontinental has not relinquished its economic control and interest in the theater.

As for Transcontinental's control over Cynatron's labor relations, we disagree with the Administrative Law Judge's conclusion that its power in this respect is "too remote and conjectural to warrant a finding that Transcontinental has any meaningful control over Cynatron's labor relations policies" The record is clear that the primary reason for Transcontinental's decision to sublease the Fremont theater was that it was an unprofitable venture, and that a major cause for this condition was its high labor costs as a percentage of operating expenses. A factor in the high labor costs was the wages and manning requirements provided under its collective-bargaining contracts.

In deciding to sublease the Fremont theater to Shaw and Krutilek, as noted above, a consideration was that they were qualified to take over the work of the projectionists, a major labor cost item. The Respondent undoubtedly knew, as did Shaw and Krutilek, that profitable operation of the Fremont theater was more feasible with lower wage scales and manning requirements than were permitted under Transcontinental's existing collective-bargaining contracts. We find relevant in this regard that Transcontinental in its sublease placed a ceiling upon Cynatron's operating costs and required the partnership to operate the theater within a mutually acceptable operating budget which included a ceiling on the weekly salary that Shaw and Krutilek could draw.

Thus, the ceiling on wages which Cynatron could pay was strictly limited. Indeed, the close control over Cynatron's operations and labor costs is indicated by the provision in the sublease that Transcontinental can cancel the sublease upon a mere 1 week's notice whenever the operation was not being operated in a "proper and businesslike" manner. The definition and determination as to the meaning of "proper and businesslike," like other restrictions in the sublease, is unilaterally decided upon by Transcontinental. It was to meet the requirements of Transcontinental that one of Cynatron's first moves was to take over the work in the projection room, and hire part-time janitors on a contract basis.

Accordingly, we are unable to agree with our dissenting colleague that Cynatron is an independent business entity, and that Cyntron and Transcontinental operated on an "arm's-length" basis. It seems plain to us that the economic realities and purposes of the relationship, its substance as distinguished from the form which our

colleague emphasizes, establish an almost complete lack of independence in Cynatron.

It is clear, as noted above, that the main consideration, and probably the only consideration, for the subleasing of the Fremont theater to Shaw and Krutilek was to relieve Transcontinental of the high union labor costs in running the theater. The selection of Shaw and Krutilek over other applicants was admittedly based upon the fact that both were qualified to take over the work of the union projectionists, a major cost item. In this regard we find significant that neither Shaw nor Krutilek had ever before operated a theater on their own, and in "leasing" the Fremont operation no monetary consideration was involved. Indeed, Shaw and Krutilek were not even required to make a deposit or post a bond to cover the property with which they were entrusted and over which Transcontinental maintained its own ownership or leasehold.

As described above, Transcontinental by maintaining a right to impose a ceiling on operating expenditures, particularly labor costs, retained power to (supervise and) oversee the operation of the Fremont theater. This limited not only the number and kinds of employees who could be hired, but also the size of the labor budget. The record does not support our dissenting colleague's statement "that Cynatron's work force is completely controlled by Cynatron alone." Krutilek frankly and forthrightly testified that if Cynatron felt the need to hire more personnel and increase the cost of the payroll above the salary figure established in the lease it would have to inform Transcontinental and receive its permission. This has never been an issue only because Cynatron has managed

to keep its labor costs within the range permitted by the lease.

Nor can we dismiss, as does our dissenting colleague, the "sublease" as merely the usual type leasehold arrangement between a lessor and leasee. The Exhibit A provisions, attached to the approximately 40 standard provisions (specifications) specifically show the close relationship and ties which Transcontinental maintains with Cynatron.

Through the special sublease provisions, Transcontinental enjoys control and meaningful supervision over the Fremont theater's operations, and at the same time is relieved of the manning requirements and the burdensome wage scales of the Unions' contracts.[2] It is apparent from an analysis of the "sublease" arrangement that Krutilek and Shaw in fact and economic reality operate the theater for Transcontinental on the basis of a salary plus a commission, consisting of a fraction of the profits, both carefully spelled out in the "sublease."

Based upon the above considerations and the record as a whole, we see no evidence that Cynatron was an

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2 The cases cited in the dissent to support its position do not appear relevant to the factual situation involved here. For example. The Southland Corporation, d/b/a Speedee 7-Eleven, 170 NLRB 1332, 67 LRRM 1582 (1968), on which the major reliance is placed has numerous operative facts not present here: (1) Southland, the franchisor, and George, the franchisee, entered into a *standard franchise agreement* which Southland had with a number of its other franchised retail grocery stores in the State of California; (2) the franchisee was *required* to provide the operational capital and inventory, and a substantial amount of the franchise cost must have been in cash; (3) under the franchise agreement, *exclusive* control over labor relations was vested in the franchisee; (4) the amount store operators were permitted to draw against anticipated profits was not subject to Southland's control; (5) although Southland issued directives, manuals, guidebooks, pricing suggestions, and wage and personnel suggestions, whether such information was followed *was left to the business judgment of the franchisee;* and (6) Southland had power to terminate the relationship without cause only upon a *full 30 days' notice.*

independent employer, nor that Shaw and Krutilek were in any sense entrepreneurs. Moreover, in our opinion the record does not demonstrate that Cynatron and Transcontinental reached the status of joint employers.

The "lease" by Transcontinental was a business arrangement, the principal consequence of which was to allow Cynatron, or Shaw and Krutilek, to perform labor services for Transcontinental at the theater under conditions which were not possible under the collective-bargaining contracts with the Unions. Contrary to the Administrative Law Judge, we find that there has been no arm's-length removal of the operation of the Fremont theater from Transcontinental. Instead, what has been accomplished is merely an arrangement in which Transcontinental was able to control the operations of the Fremont theater, receive the benefits of substantially lower labor cost, and not be deprived of the profits which might result.

Accordingly, we find that Transcontinental never relinquished its ownership of the Fremont theater, and that its relationship with Cynatron was merely an arrangement by which it sought to place the operation in a more profitable position, through the reduction of labor costs. In our view Transcontinental continued to operate the theater, and Shaw and Krutilek were its employees, or contracts with the Unions continued to be operable. Cynatron, therefore, was obligated to abide by the contracts' terms.

Accordingly, when Local 169 and Local 121 were notified on November 12, 1973, of Transcontinental's decision to lease the Fremont theater to Cynatron under the circumstances herein described, the Unions were not

required to bargain over what was a *fait accompli*. Transcontinental's actions amounted to a unilateral change of wages and working conditions under the existing contracts with the Unions, since the contracts' provisions equally applied whether the Fremont theater was to be run by Transcontinental or through a working arrangement with Cynatron.

Contrary to the Administrative Law Judge, we find, therefore, that Transcontinental's conduct thereby violated Section 8(a)(5) of the Act. Moreover, we further find that the termination, on November 28, of the two projectionists covered by Local 169's contract and the two janitorial employees covered by Local 121's contract as a result of this illegal conduct violated Section 8(a)(3) and (1) of the Act. It is clear that the two projectionists and two janitors were terminated because their rates of pay were determined and affected by their membership in a labor organization.

In view of the above, we find that Respondent Transcontinental failed to bargain in good faith with respect to the arrangements made with Cynatron in regard to the changed operations of the Fremont theater, and thereby violated Section 8(a)(5) and (1) of the Act. We also find that the termination of employees as a result of this illegal conduct violated Section 8(a)(3) and (1) of the Act.

Order: Cease and desist from refusing to bargain with union; discriminating against employees because such employees are covered by unions' contract; in any like or related manner interfering with employees' LMRA rights. Bargain collectively with unions; offer terminated em-

ployees reinstatement and make them whole for their lost earnings; post notice.

KENNEDY, Member, dissenting:

(*Text*) I do not agree with my colleagues that the evidence supports a finding that Respondent Transcontinental Thethers, Inc., and Respondent Cynatron Enterprises are a single business enterprise. The General Counsel lacked the temerity to make that allegation in the complaint or at the hearing, advancing instead the contention that these two Respondents are a joint employer. The General Counsel contends that Respondents are joint employers of the employees employed at the Showcase Cinemas I and II located in Fremont, California, because Respondent Transcontinental allegedly controls Respondent Cynatron's labor policy vis-a-vis Cynatron's employees. Unless that is true, this Board has no jurisdiction over Respondent Cynatron and cannot pass upon Cynatron's conduct in this matter. The Administrative Law Judge in his well-reasoned Decision found this not proven, and therefore dismissed the charges pendent thereon, as well as the other charges for which he found no evidence extant to support them.[4] I agree fully with his analysis and would adopt his recommendation that the complaint be dismissed in its entirety.

Respondent Transcontinental is a corporation which operates 103 movie theaters in California and other States. In 1970 it began to operate a theater in Fremont,

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4 Since the majority finds that the two Respondents are a single business entity, i.e., that the Cynatron partnership members are "employees" of Transcontinental, the majority is thereby able to find 8(a)(3) and (5) violations simply on the basis of a "replacement" of the union employees at the theater with the general partners.

California, pursuant to a 25-year lease. At the close of its fiscal year on June 30, 1971, Transcontinental realized on the operation of the theater a net loss before depreciation of $3,215; in 1972, a loss of $2,862; and in 1973, a loss of $46,182. Because of this loss, Transcontinental made a decision, not unusual in its industry, to sublease the theater. After receiving several offers, on November 28, 1972, Transcontinental subleased the theater to Cynatron Enterprises.

Cynatron is a general business partnership composed of partners Douglas Krutilek and Robert Shaw.[5] The partnership is licensed as such to do business under the California Civil Code. Cynatron began operating the theater on November 28 pursuant to its sublease from Transcontinental.

The majority finds that certain provisions of the sublease prove that the Cynatron partners are the employees of Transcontinental. In my view, none of these provisions satisfy the tests set forth in Board and court precedent which would warrant a finding of single-employer status here.

The Board will treat separate entities as one employer where their operation and ownership are highly integrated. Principal factors which must be considered in resolving this question are interrelation of operation, common management, centralized control of labor relations, and common ownership of financial control. Sakrete of Northern California, Inc., 137 NLRB 1220, 50 LRRM 1343 (1962), enfd. 332 F.2d 902, 56 LRRM 2373 (C.A. 9, 1964), cert. denied 379 U.S. 961, 58 LRRM 2192

5 They had never had an employment or business relationship with Transcontinental before the events herein occurred.

(1965). None of these factors is controlling, but emphasis is placed upon operational interrelationship, common management, and central control of labor relations. Drapery Manufacturing Co., Inc., 166 NLRB 805, 65 LRRM 1655 (1967). Just recently, in Gerace Construction Inc., 193 NLRB 645, 78 LRRM 1367, 1368 (1971), the Board held:

"A critical factor in determining whether separate legal entities operate as a single employing enterprise is the degree of common control of labor relations policies.[1] Thus, the Board has found common ownership not determinative where requisite common control was not shown,[2] and the Board has held with court approval that such common control must be actual or active as distinguished from potential control.[3]" [6]

"[1]N.L.R.B. v. Condenser Corporation, 128 F2d 67, 71, 10 LRRM 483. See also J. Howard Jenks, d/b/a Glendora Plumbing, 165 NLRB 101, 65 LRRM 1228; L & S Construction Company, Inc., 155 NLRB 524, 60 LRRM 1353; AAA Electric, Inc. and Simms Electric Co., 190 NLRB 247, 77 LRRM 1169.

"[2]Joe Robertson & Son, Inc., 174 NLRB 1073, 70 LRRM 1396; Bel-Air Door, et al., 150 NLRB 481, 58 LRRM 1109.

"[3]Los Angeles Newspaper Guild, Local 69, et al. (Hearst Corp.), 185 NLRB 303, 75 LRRM 1014 enfd,

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6 Indeed, the Board has held, with court approval, that separate corporate subsidiaries are separate persons, if neither the subsidiaries nor the parent exercises *actual*, as opposed to potential, control over the day-to-day operations or labor relations of the other. Los Angeles Newspaper Guild, Local 69, et al. (Hearst Corp.), 185 NLRB 303, 75 LRRM 1014 (1970); Knight Newspapers, 138 NLRB 1346, 51 LRRM 1169 (1962), enfd. sub. nom. Miami Newspaper Printing Pressmen's Local No. 46 v. N.L.R.B., 322 F.2d 405, 53 LRRM 2629 (C.A.D.C., 1961).

443 F.2d 1173, 77 LRRM 2895 (C.A. 9); Poole's Warehousing, Inc., 158 NLRB 1281, 62 LRRM 1197; Miami Newspaper Printing Pressmen's Local 46 v. N.L.R.B., 322 F.2d 405, 53 LRRM 2629 (C.A.D.C.).

In the instant case the record is clear that there is no common ownership. Cynatron has no investment in, no representation in, nor stock in Transcontinental. And Transcontinental has no ownership interest in the general partnership of Krutilek and Shaw. As for common management, there is none in the day-to-day operations of the theater. Cynatron supplies Transcontinental with daily reports on forms prescribed by Transcontinental so that Transcontinental can comply with the requirement of its master lease in giving the same reports to the owner of the theater, but only Cynatron controls the composing of those reports and their content. Transcontinental may inspect the theater to see if it is properly run, but it does not appear that it has ever done so. Transcontinental also may terminate the lease upon seven days' notice if it is not run in a businesslike manner, or if Cynatron does not pay its obligations. But as the sublease expressly provides, Cynatron is solely responsible for its debts. Thus, all that the termination rights give Transcontinental is the right, if necessary, to rid itself of a failing and/or insolvent tenant. There is no evidence that Transcontinental has ever used this power to gain an active role in the day-to-day management of the theater. Furthermore, the sublease is for a full one-year term, a substantial leasehold. As the Board stated in Clark Oil & Refining Corporation, 129 NLRB 750, 47 LRRM 1056 (1960), the power to terminate on short notice because in the grantor's view the grantee is conducting an unsatisfactory operation still leaves a substantial tenancy, a condition not usually at-

tached to master-servant relations, and one which does not negate independent contractor status.

The sublease also reserves to Transcontinental the power to *assist* Cynatron in renting films and determining programming until Cynatron acquired sufficient experience. This did not give Transcontinental the power to require Cynatron to follow its desires in this regard, nor is there any evidence that Transcontinental ever attempted to do so. Furthermore, as the Administrative Law Judge found, Cynatron in fact bids for and books its own films. This is a significant managerial task, since Cynatron must compete with numerous area theaters when bidding to the film companies for such items as first-run rights on particularly popular films.

Respondent Transcontinental and Respondent Cynatron do not share financial control of Cynatron. The majority appears to find sections 34 and 35 of the sublease significant here. Section 34 requires Cynatron to pay Transcontinental $3,400 per month plus five percent of the box office admissions and receipts less the guaranteed minimum monthly rental ($3,400), and five percent of the gross sales of merchandise, food, and drink. However, the record reveals that this clause is nothing more than a mirror image of the master lease between Transcontinental and the owner of the shopping center, and is in fact the basic monthly rental of the theater. The profit Transcontinental realizes, if any, is the 75 percent of the *net* profits of the four- or five-week period as determined by Cynatron's operating period. This is where Transcontinental will make a profit on the theater, if it realizes any at all. Contrary to the view of my colleagues, Cynatron's promise to pay 75 percent of its net profits is legally sufficient and substantial consideration, under the

law of contracts, for the right to use Transcontinental equipment and furnishings together with the leasehold rights of occupation and use.

Section 35 of the sublease provides:

"35. Before computing 75 percent of the net operating profits, subleasee shall be allowed to draw the sum of $250 per week as a salary which said sum shall be considered an operating expense of said theater."

The record shows that the operating expense budget, including the amount of Cynatron's partnership salary draw, advertising, etc., is set by mutual negotiation between Cynatron and Transcontinental. Indeed, the first such budget was determined entirely by Cynatron and submitted to and accepted by Transcontinental as reasonable. The budget has been revised several times by Cynatron since the inception of the sublease, with no more formality than simple notification of that fact to Transcontinental.[7] Transcontinental President Lippert testified without contradiction that the operating budget is important only to assure Transcontinental that Cynatron, with whom Transcontinental had had no prior experience, would remain in operation.

The majority contends without citation of authority that on this basis Respondents are a single business enterprise, and that Cynatron has no entrepreneurial status. Such a finding is contrary to the evidence. The Administrative Law Judge found, as the General Counsel alleged in his complaint, that Respondents are separate business entities. Transcontinental has no ownership interest in

7 E.G., the record proves that the adertising budget has gone from $350 to $400 or $500 a week and that the partnership has increased its salaries and granted itself travel allowances.

Cynatron. Cynatron has its own business license, maintains its own bank accounts and books of account, employs its own accountant, purchases its own tax advice, is completely and solely responsible for paying its own operating expenses, sets its own admission prices, and bids for its own films. I know of no case, nor does the majority cite one, where such a business entity has been held by the Board to be "employees." I do know of cases to the opposite effect. In The Southland Corporation, d/b/a Speedee 7-Eleven, 170 NLRB 1332, 67 LRRM 1582 (1968),[8] the Board was faced with two issues: (a) whether Southland, the franchisor and owner of the retail grocery store, and George, an individual, were a single employer (i.e., whether George was an employee of Southland), and (b) whether Southland and George were a *joint* employer, which is what the General Counsel alleged in the instant case. The facts showed that Southland built and owned the store, outfitted it with fixtures and goods, and then leased it to the franchisee George. As here, George paid no cash. Southland provided bookkeeping services and maintained George's bank accounts. George could not withdraw profits below a fixed net worth, and could not take a draw unless he worked in the store. Southland received 55 percent of the adjusted *gross* profits (in the instant case the figure is 75 percent of *net* profits) on the franchise. Despite Southland's policy manual, Southland's retail pricing arrangement, and Southland's right to terminate *without cause* upon 30 days' notice, the Board, including Member Jenkins, found that Southland did not "so control the means by which George operates his store to warrant finding his employees to be employees of Southland. We find George to be an independent contractor."

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8 See also cases cited supra.

In so concluding, the Board found that there was no evidence of centralized control of labor relations; i.e., that Southland had "ever exercised any control over any of the terms of employment of the store employees." So also here, where the record clearly supports the General Counsel's specific allegation in the complaint:

"II. (f) At all times since November 28, 1973 (the effective date of the sublease), Respondent Cynatron has hired, fired, disciplined and supervised the employees employed at the Showcase Cinemas I and II in Fremont, California."

In view of the foregoing, I believe that the Board can reach no conclusion other than that Respondent Transcontinental and Respondent Cynatron are independent contractors and separate employers within the meaning of Section 2(2) and 2(3) of the Act.

There remains the second issue raised in Southland and raised here by the complaint; i.e., whether Transcontinental and Cynatron are *joint* employers. I agree fully with the Administrative Law Judge that they are not. The critical factor in determining whether a joint employer relationship exists is the degree of control which one entity has over the labor relations policy of another.[9] On *this* issue (but not on the single employer issue), the Board stated in Southland, supra, that:

"It is immaterial whether this control be actually exercised so long as it may potentially be exercised by virtue of the agreement under which the parties operate.[4] In the instant case Southland neither exercises actual, nor possesses potential, control over the store's labor relations

9 S.A.G.E., Inc. of Houston and its Licensees, 146 NLRB 325, 55 LRRM 1297 (1964).

under the franchise agreement. It is undisputed that George alone and exclusively hires, fires, and in every other respect sets the terms and conditions of employment of the store's employees. There is no evidence that the clear language of Article 14 of the franchise agreement granting complete control over store labor relations to the franchise has ever been disregarded by the parties or that Southland has ever sought to interpret the agreement in such a way as to vest in itself the right to influence George's labor relations policies.[5]

"In its brief Petitioner advances the contention that Southland "in practice does keep a check on the number of employees, their hours and wages," by means of Article 21 of the franchise agreement. Article 21 states that it the franchisee's payroll "exceeds 8 percent of net sales for said preceding week, or $200, whichever is greater, the remittance (the owner's weekly draw) may be reduced by the amount of such excess." But it does not require George to reduce the number of hours or wages of its employees.

"We are of the opinion that the impact of this contractual provision upon George's employees is too remote and conjectural to warrant a finding that Southland has any meaningful control over George's labor relations policies. Moveover, there is no evidence that George has ever been affected by this provision. Indeed, the record shows that George does not even take a draw. Further, even if George did accept a draw it would be sheer speculation to assume that the terms of employment of his employees would in any way be affected by the draw restriction.

"4 Thriftown, Inc., 161 NLRB 603, 63 LRRM 1298. Although in Thriftown the Board found the termination

clause in the parties' agreement to be significant in establishing a joint employer relationship, this was found to be so because of the "special nature of the relationship," i.e., a discount department store in which all the leased departments were under one roof and were held out to the public to be part of an integrated enterprise. Moreover, the lease agreement specifically reserved to Thriftown the right to control its lessees' labor relations, a right which would normally be exercised in order to prevent a dispute involving one lessee from adversely affecting the operation of the entire store.

"5 In this regard it is noteworthy that on one occasion a customer complained to Southland about the conduct of a clerk in George's store. Although a Southland representative suggested to George that the employee be fired, George rejected the suggestion and continued to employ the clerk. Southland thereafter made no attempt to alter George's decision.

"For the foregoing reasons we find on the present record that George and Southland are not joint employers of the store employees within the meaning of the Act. Accordingly, as George is the sole employer and as George's annual retail sales are less than the Board's minimum retail jurisdictional standards, we find that it will not effectuate the policies of the Act to assert jurisdiction herein, and we shall dismiss the petition."

So also do I find here. Again, I refer to the General Counsel's admission that Cynatron hires, fires, disciplines, and supervises its own employees. Furthermore, Cynatron's operating budget limitation is, unlike in Southland, largely self-imposed and altered as Cynatron thinks is required. The record shows that Cynatron's work force is completely controlled by Cynatron alone. Furthermore,

Transcontinental has never attempted to participate in or influence a labor relations decision by Cynatron.

All of which should leave one puzzled as to the reasons for prosecution of this case. But after more than 20 years of legal experience in the regions of this Board, my memory is refreshed by the trial attorney's candid concession on the record that:

"To be absolutely candid, one of the reasons I was having difficulty answering your questions is I have been unable to find the answers myself because some bright legal theoretician in Washington came up with these violations based on case citations from which inferences are drawn."

Principally among these cases appears to be Jackson Manor Nursing Home, Inc., and/or Isaac Mizrahi d/b/a Jackson Manor Nursing Home, Snapper Creek Nursing Home and Arch Nursing Home, 194 NLRB 892, 79 LRRM 1166 (1972). I agree with the Administrative Law Judge that reliance upon Jackson here is unwarranted. The "potential control" which the Board found there existed in fact. The lease agreement there reserved to the lessor the right to be present and to fully participate in collective-bargaining sessions, and required the lessor's approval before execution of any labor contract by the lessee. Jackson Manor is clearly inapposite. The instant case is controlled by Southland, supra, since here there is no evidence of "potential control." In my view Transcontinental and Cynatron are not joint employers of Cynatron's employees.

For all of the foregoing reasons, I would adopt the Administrative Law Judge's well-reasoned Decision, and would dismiss the complaint in its entirety.

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MICHAEL RODAK, JR., CLERK

No. 80-219

In the Supreme Court of the United States

OCTOBER TERM, 1979

BIG BEAR SUPERMARKETS NO. 3, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-219

BIG BEAR SUPERMARKETS NO. 3, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the purported franchisee of one of petitioner's stores was petitioner's alter ego and that therefore they constituted a single employer bound by petitioner's collective bargaining agreements covering that store.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-37) is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. 43-66) are reported at 239 N.L.R.B. 179.

JURISDICTION

The judgment of the court of appeals (Pet. App. 38-42) was entered on May 12, 1980. A petition for rehearing was denied on May 22, 1980 (Pet. App. 17). The petition for a writ of certiorari was filed on August 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Big Bear Supermarkets operates a chain of supermarkets in San Diego County, all of which for many years have been covered by collective agreements with the Unions (Pet. App. 45).[1] Due to a series of condemnations that drastically reduced the size of its parking area, the Big Bear store at La Mesa suffered a substantial drop in profits (*id.* at 50). Thereafter, Big Bear leased the La Mesa store to Richard Holmes, manager of another Big Bear store and the son of Big Bear's general manager and secretary-treasurer (*id.* at 46). The agreement granted Holmes a franchise to use Big Bear's trade name, trademark, labels, copyrights and services in the operation of the store (*id.* at 94).

Although the agreement provided that Holmes would be an independent contractor with control over labor

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[1]Retail Clerks Union, Local 1222, Retail Clerks International Association, AFL-CIO, and Amalgamated Meat Cutters Local 229, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

relations, the franchise agreement gave Big Bear extensive authority over the operation of the store. Thus, the store was to be operated as part of Big Bear's system of stores, and Big Bear was to provide no less supervision than it provided to its other stores. The store had to carry product lines customarily carried by Big Bear's stores, in quantities determined by Big Bear. No product line could be changed without its permission. Big Bear had sole discretion to contract for advertising and Holmes could purchase additional advertising only with its permission. Holmes was required to sell goods advertised by Big Bear at the advertised prices and honor discount coupons contained in Big Bear's advertisements. If Holmes took any action without Big Bear's permission, where such permission was required by the franchise agreement, the franchise could be canceled. Big Bear actively exercised the right of control that the franchise agreement gave it. (Pet. App. 52-53.) Its supervisors came regularly to the store to direct the store's produce man and head meat-cutter (*id.* at 111).

Under the provisions of the agreement, Big Bear loaned all funds required for the operation of the store. In addition, Big Bear was required to make a weekly payment to Holmes of an amount approximately equal to the salaries of the managers at petitioner's other stores. That amount could not be reduced if the store was unprofitable. Although the store had more than $100,000 worth of inventory when the franchise agreement was executed, Holmes made a down payment of only $2,000. He executed an unsecured promissory note for the remaining value of the inventory, to be repaid out of the store's profits. There was no provision for repayment if the store was unprofitable, or if Holmes, who was suffering from a progressively disabling disease, could not continue running the store. (Pet. App. 54-58.) The La Mesa store was the only Big Bear store subject to such a franchise agreement (*id.* at 46).

There were 12 employees at the La Mesa store before Holmes took over its operation. Except for a part-time janitor not included in either bargaining unit, no employee was retained by Holmes. Subsequently, Big Bear transferred all unit employees to its other stores without giving them the option of seeking continued employment at the La Mesa store, even though the Retail Clerks' contract provided for such an option. Big Bear did not notify the Unions of the transfer of the employees. (Pet. App. 46-47.)

Holmes refused to recognize the Unions as the bargaining representatives of the employees, to apply the terms of Big Bear's contracts with the Unions to the new employees, or to supply the Retail Clerks with the names and addresses of the unit employees. He paid lower wages and extended fewer benefits than those required by the contracts. (Pet. App. 47.)[2]

2. The Board found that the franchise agreement was not a bona fide arm's-length transaction, but rather was a sham designed to enable Big Bear to retain control of the operations of the store without union contracts (Pet. App. 60). The Board relied on "the selection of Richard Holmes, a close relative of high management, as the purported franchisee; the controls retained and exercised by Big Bear over the store's operation; and the economic realities of the arrangement reflected in the franchise agreement whereby Holmes initially invested only $2,000 cash and Big Bear finance[d] the store's operation without charging interest to Holmes * * * " (*id.* at 61). The Board rejected Big Bear's assertion that it entered into the

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[2]From November 15, 1976, through July 31, 1977, Holmes paid $81,687 in wages and $1,988 in other employee benefits. During the year ending July 31, 1976, Big Bear had paid employees at that store $174,204 in wages and $24,537 in other benefits (Pet. App. 59-60).

franchise arrangement to relieve itself of an unprofitable operation (*id.* at 58). The Board pointed out that the arrangement did not accomplish that purpose since "any true entrepreneurial risk" was borne by Big Bear and not Holmes (*id.* at 58-59). Nor did the arrangement relieve the cause of the decline in profitability—the lack of parking space (*id.* at 59). "What was accomplished through the purported franchising, however, was a drastic reduction in the store's operating costs through avoidance of the application of [Big Bear's] union contracts to the franchised store's employees" (*ibid.*). In finding that Big Bear's "real purpose" was to "oust the Unions from its La Mesa store," the Board also relied on the fact that Big Bear "preemptor[ily] transfer[red] out [the unit employees, thereby] * * * obviat[ing] the possibility that Holmes would be a successor employer obliged, despite even a bona fide franchising, to recognize and bargain with the Unions" (*id.* at 60-61).

In these circumstances, the Board found that Holmes was an alter ego of Big Bear, that Big Bear and Holmes were a single employer under the National Labor Relations Act, and that the La Mesa store continued to be covered by the Union contracts. Big Bear and Holmes violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158 (a)(5) and (1), by refusing to recognize the Unions as the bargaining representatives of the employees at its La Mesa store and by refusing to apply the terms of its contracts with the Unions to those employees. The Board further found that Big Bear violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by transferring employees from the La Mesa store to its other stores because of their union representation (Pet. App. 62-63). To remedy Big Bear's unlawful refusal to apply the collective agreements, the Board ordered that those contracts be applied to the employees at the La Mesa store retroactively to the date of the franchise agreement,

and that such employees be made whole for any losses suffered as a result of Big Bear's prior failure to meet its statutory obligations (*id.* at 64-65).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 19). The court agreed with the Board that the "franchise arrangement was not executed for valid business considerations" (*id.* at 30). The court also agreed that "the financial provisions of the agreement are uncharacteristic of a bona fide transfer of ownership" (*id.* at 31). Finally, while noting that "control over labor relations is ordinarily accorded special significance" in determining single-employer status (*id.* at 32), the court agreed with the Board that in the particular circumstances here that factor was entitled to no weight (*id.* at 32-33):

> It would make little sense to give weight to Holmes's control over labor relations in light of the Board's supportable finding that the purpose of the franchise agreement was the evasion of bargaining obligations; transfer of control over labor relations from Big Bear to Holmes helped to effectuate that improper purpose.

ARGUMENT

1. Petitioner does not contest the well-established criteria for determining single-employer status—interrelation of operations, common management, centralized control of labor relations, and common ownership. See *Radio & Television Broadcast Technicians Local Union 1264, IBEW* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965). Nor does it challenge the settled rule that an employer may not evade its obligations under the Act by setting up what appears to be a new business, but is actually a disguised continuance of the old one. And it does not dispute the proposition that whether there has been a true change in ownership or

a disguised continuation of the operation of the old owner is a question of fact. See *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100, 106 (1942). Thus, the only issue in this case is whether substantial evidence supports the Board's finding, sustained by the court of appeals, that the operation of the La Mesa store by Holmes was a disguised continuance of its prior operation by Big Bear. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S 474, 480-491 (1951).

In any event, as shown in the statement, the Board's decision is amply supported by the record. Contrary to petitioner's contention (Pet. 9), the decision of the court of appeals does not hold that common ownership is dispositive in determining single-employer status, or that control over labor relations is irrelevant. In the context of this case, it is clear that the court regarded as critical the fact that the franchise agreement was not a bona fide transfer of ownership, but a sham designed to enable petitioner to evade its bargaining obligations. Only in this context does common ownership take on added significance. Likewise, the refusal to give weight to Holmes' control over labor relations must be viewed in light of the finding that such control was transferred as part of the unlawful scheme to rid petitioner of its bargaining obligations; giving conclusive weight to the transfer of control over labor relations in these circumstances would permit petitioner to profit by its own wrong.[3]

Petitioner does not contend that the court of appeals' finding of single-employer status is in conflict with any decision of this Court or any other court of appeals.

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[3]Moreover, even in cases not involving an alter ego relationship, common control of day-to-day labor relations is not essential to a finding of single-employer status. See *Royal Typewriter Co.* v. *NLRB*, 533 F. 2d 1030, 1043 (8th Cir. 1976), and cases cited therein.

Rather, petitioner argues that the court of appeals failed to follow its own prior decision in *NLRB* v. *Transcontinental Theaters, Inc.*, 568 F. 2d 125 (9th Cir. 1977). However, even if it were true that the decision here created an intra-circuit conflict, that would not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

In any event, the court of appeals, in denying the petition for rehearing, amended its opinion to state that *Transcontinental* was clearly distinguishable from this case because the franchise agreement here was motivated by a desire to avoid petitioner's bargaining obligations while no such improper motivation existed in *Transcontinental* (Pet. App. 36-37).

2. Petitioner's challenge to the propriety of the Board's remedial order (Pet. 9-13) is not properly raised in this Court. Petitioner never presented its objection to the remedial order to the Board. After the Board issued its decision, petitioner did not request that the remedial order be reconsidered on the grounds it now relies on, and it does not suggest any extraordinary circumstances justifying its failure to do so. Accordingly, Section 10(e) of the Act, 29 U.S.C. 160(e), precludes petitioner from raising its objections to the remedial order in this Court. *ILGWU* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Moreover, petitioner did not attack the propriety of the Board's remedial order in its brief to the court of appeals. It first raised the issue in its petition for rehearing, which the court denied without commenting on this issue. When issues are neither raised before nor decided by a court of appeals this Court will not ordinarily consider them. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). This Court has also refused to consider questions raised belatedly in a petition for rehearing and not actually decided by the court below. See *Herndon* v.

Georgia, 295 U.S. 441, 443 (1935). Cf. *Garner* v. *United States*, 424 U.S. 648, 656 n.10 (1976) (declining to pass on contentions "not deemed of sufficient merit to warrant discussion below").[4]

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[4]In any event, petitioner's challenge to the remedy is without merit. This Court's holding in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 281-291 (1972), that a successor is not bound by its predecessor's contract where it has not agreed to assume the obligations under that contract, has never been applied where, as here, the new entity is found to be a disguised continuance of the entity that agreed to the contract and is established for the specific purpose of evading the obligations imposed by that contract. The speculation (Pet. 12) that petitioner might not have agreed to the same contractual terms if it had known that the La Mesa store would be included in the unit is without merit. Petitioner knew, when it negotiated the 1978 contract, that the status of the La Mesa store was being litigated. The potential liability resulting from a decision that the contract applied to that store could have been reflected in petitioner's negotiating position. See generally *Golden State Bottling Co.* v. *NLRB*, 414 U.S 168, 185 (1973). Once the contract was signed, and the Board found that the failure to apply it to the La Mesa store was unlawful, the Board's authority to require petitioner to pay the employees what it would have paid them if it had complied with its statutory obligations is clear. *NLRB* v. *Strong*, 393 U.S. 357, 359-360 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board

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